SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM

FINAL REPORT
ON
PHASE TWO

MAY 2010 – MAY 2012

WWW.DISCOVERYPILOT.COM

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The Committee wishes to express its whole-hearted appreciation of Ms. Margaret Winkler and Ms. Gabriela Kennedy, Judicial Assistants to Chief Judge James F. Holderman, for their outstanding and invaluable work on behalf of the Committee throughout its existence.

1. EXECUTIVE SUMMARY

The Seventh Circuit Electronic Discovery Pilot Program Committee ("Committee") was formed in May 2009 to conduct a multi-year, multi-phase process to develop, implement, evaluate, and improve pretrial litigation procedures that would provide fairness and justice to all parties while reducing the cost and burden of electronic discovery consistent with Rule 1 of the Federal Rules of Civil Procedure. To that end we brought together the most talented experts in the Seventh Circuit from all sectors of the bar, including government lawyers, plaintiffs' lawyers, defense lawyers, and in-house lawyers from companies with large information systems, as well as experts in relevant fields of technology. The Committee developed and promulgated "Principles Relating to the Discovery of Electronically Stored Information" ("Principles") and a Proposed Standing Order by which participating judges could implement the Principles in the Pilot Program's test cases.

A. Phase One

From October 2009 through March 2010, thirteen judges of the United States District Court for the Northern District of Illinois implemented the Phase One Principles in ninety-three (93) civil cases pending on their individual dockets. The Phase One judges and the counsel for the parties in the Phase One cases were surveyed in April 2010. On May 1, 2010, the Committee unveiled its detailed Report on Phase One at the 2010 Seventh Circuit Bar Association meeting in Chicago. Phase One was necessarily limited in duration to provide a basis for evaluating any needed adjustments to the Pilot Program. The Phase One Report provided an initial "snapshot" of how the Principles appeared to be working in practice. The full Phase One Report is available at www.DiscoveryPilot.com but, in summary, the participating judges overwhelmingly felt that the Principles were having a positive effect on counsel's cooperation with opposing counsel and on counsel's knowledge of procedures to follow addressing electronic discovery issues. In particular, the judges felt that the involvement of e-discovery liaisons required by Principle 2.02 contributed to a more efficient and cost effective discovery process. Many of the participating lawyers reported little impact on their cases, presumably because of the limited duration of Phase One. But those lawyers who did see an effect from the application of the Principles in their cases overwhelmingly reported that the effect was positive in terms of promoting fairness, fostering more amicable dispute resolution, and facilitating advocacy on behalf of their clients. As a result, apart from some minor revisions suggested by the Phase One Report, the Principles were mostly unchanged for Phase Two of the Pilot Program. The modifications are set out in Section 9.D (pp. 74-75) and Section 9.I (pp. 96-97).

B. Phase Two

Although Phase Two was originally planned to last one year, from May 2010 to May 2011, the Committee early in Phase Two determined that a two-year duration would be preferable and would allow a fuller evaluation of the Principles' application during Phase Two. In May 2011, the Committee issued an Interim Report (available at www.DiscoveryPilot.com) midway through the two-year period designated for Phase Two of the Pilot Program, and Chief District Judge James Holderman presented the Interim Report on May 17, 2011, at the Seventh Circuit Bar Association Meeting and Judicial Conference in Milwaukee, Wisconsin.

During Phase Two, a number of e-discovery experts from across the country joined as committee members or advisors to the Pilot Program. The Committee had about fifty (50) members and advisors by the end of Phase One in May 2010, and by the end of Phase Two that number had tripled to over one hundred and fifty (150) members. The Committee during Phase Two has included members not only from all seven (7) federal districts in the three (3) states of the Seventh Circuit, but also from an additional eighteen (18) states outside the Seventh Circuit. The Pilot Program has grown from the thirteen (13) initial participating judges and ninety-three (93) Pilot Program cases studied for a six (6) month period in Phase One, to forty (40) participating judges and two hundred ninety-six (296) cases in which the Pilot Program Principles were tested during the Phase Two period (May 2010 - May 2012).

During Phase Two of the Pilot Program, the Education Subcommittee produced five (5) free educational on-line webinars and another five (5) live seminars all of which were attended by more than ten thousand (10,000) lawyers and others seeking to further their understanding about discovery procedures and the technology related to electronically stored information. The Subcommittee has also created a compilation of case law concerning electronic discovery issues from the Seventh Circuit, along with seminal electronic discovery cases from around the country. In furtherance of the Pilot Program's educational mission, the Committee launched its web site, www.DiscoveryPilot.com, in May 2011, where it posts information and materials for judges and practitioners seeking to stay abreast of the latest e-discovery developments.

The Preservation and Early Case Assessment Subcommittees joined together and revised certain of the Phase One Pilot Program Principles in response to the Phase One survey results. The Phase Two Principles were promulgated on August 1, 2010, and were applied by the participating judges and lawyers in the cases that were a part of Phase Two.

The Criminal Discovery Subcommittee was created during Phase Two and is comprised of representatives from the U.S. Attorney's Office and the Federal Defender Office, as well as other

members of the criminal defense bar, who are working together to develop resources to educate criminal practitioners about the use of electronic discovery, with the objective of identifying and addressing commonly occurring issues relating to electronic discovery in criminal cases.

The Survey Subcommittee partnered with experts at the Federal Judicial Center of the United States Courts ("FJC") and with the cooperation of each chief district judge and district court clerk in the Seventh Circuit designed an E-filer Baseline Survey, which surveyed over six thousand (6,000) federal court electronic filing attorneys throughout the seven (7) districts of the Seventh Circuit during August 2010 to set the stage for future Pilot Program surveys as to the effectiveness of the Principles. In March 2012, the same E-filer Baseline Survey was repeated. Again, over six thousand (6,000) e-filing attorneys in all seven (7) districts of the Seventh Circuit responded. The March 2012 E-filer Baseline Survey added a series of questions focused on the responding attorneys' awareness of the Pilot Program. Additionally, in March 2012, the Survey Subcommittee administered both the Phase Two Judge Survey and the Phase Two Attorney Survey to judges and attorneys with cases in which Phase Two Principles were applied to assess the effectiveness of the Pilot Program Principles during Phase Two.

The Committee's Communications and Outreach Subcommittee coordinated the Committee members' involvement in presenting information and materials about the Pilot Program in over forty-five (45) seminars and panel discussions in fifteen (15) different states throughout the country and internationally during Phase Two.

The National Outreach and Membership Subcommittees continue to respond to and coordinate the tremendous interest in the Pilot Program by judges, attorneys, and business people both in the Seventh Circuit and across the country. By the end of Phase Two, people from twenty-one (21) states and the District of Columbia had become Committee members or advisors to the Pilot Program.

The Technology Subcommittee, which is comprised of seasoned technology thought-leaders, was formed as part of Phase Two to keep up with rapidly evolving technology and to further advance the bench's and bar's understanding and use of new technology in the electronic record retention and discovery field.

The Web Site Subcommittee, which was also formed as a part of Phase Two, is responsible for designing and managing the Pilot Program's web site, www.DiscoveryPilot.com, that was launched on May 1, 2011, with the support and expertise of Justia Inc. of Mountain View, California. The Web site Subcommittee has continued to update, expand and enhance the information offerings on

www.DiscoveryPilot.com throughout the second half of Phase Two, and will continue to do so as the Pilot Program enters Phase Three.

The Phase Two survey results, which were based on a larger population of judges (twenty-seven (27) judges responded in Phase Two compared to thirteen (13) in Phase One) and lawyers (two hundred thirty-four (234) lawyers responded in Phase Two compared to one hundred thirty-three (133) in Phase One), were similar in many respects to the results of the Phase One surveys.

For example, in both the Phase One and Phase Two Judge Surveys, one hundred percent (100%) of the responding judges who had cases involving e-discovery liaisons agreed or strongly agreed that "[t]he involvement of e-discovery liaison(s) has contributed to a more efficient discovery process." (Table J-21.)[1] All of the responding judges felt that the Principles increased or did not affect the lawyers' levels of cooperation to efficiently resolve the case (Table J-5), the lawyers' likelihood to reach agreements on procedures to handle inadvertent disclosures (Table J-6), the lawyers' meaningful attempts to resolve discovery disputes without the court (Table J-7), the lawyers' promptness in bringing unresolved disputes to the court (Table J-8), and the parties' ability to obtain relevant documents (Table J-9.)

Also in Phase One, ninety-six percent (96%) of the attorneys responded that the Principles had no effect or increased the attorney's ability to zealously represent the client, and in Phase Two ninety-seven percent (97%) responded the same. (Table A-21.)[2] When asked if the Principles affected the fairness of the e-discovery in both the Phase One and Phase Two Attorney Surveys, fifty-five percent (55%) responded, "No effect." Of the remaining forty-five percent (45%), forty-three percent (43%) of the responding attorneys in Phase One said the Principles increased or greatly increased fairness and 40% in Phase Two thought the Principles increased or greatly increased fairness. (Table A-23.)

Both the Phase One and Phase Two surveys' results show that in those cases in which the Principles had a perceived effect, those effects were overwhelmingly positive with respect to assisting attorneys' cooperation and enhancing their ability to resolve disputes amicably, their ability to obtain relevant documents, and their ability to zealously represent their clients, as well as providing fairness to the process. Attorneys reported that the Principles improved levels of cooperation in thirty-six percent (36%) of the cases and decreased it in two percent (2%). (Table A-20.) Attorneys reported that the Principles increased the ability to zealously represent clients in

[1] The Phase Two Judge Survey Data Results are attached as Appendix F.2.a.

[2] The Phase Two Attorney Survey Data Results are attached as Appendix F.2.a.

twenty-five percent (25%) of the cases, and decreased it in three percent (3%). (Table A-21.) Attorneys reported that the Principles improved the ability to resolve disputes without court involvement in thirty-five percent (35%) of the cases, and decreased it in four percent (4%). (Table A-22.) Attorneys reported that the Principles increased the fairness of the e-discovery process in forty percent (40%) of the cases, and decreased it in five percent (5%). (Table A-23.) Attorneys reported that the Principles increased the ability to obtain relevant documents in twenty-eight percent (28%) of the cases, and decreased it in two percent (2%). (Table A-24.) The judges agree. Of the judge respondents: seventy-eight (78%) reported improved cooperation (twenty-two percent (22%) greatly) and none reported decreased cooperation (Table J-5); seventy-five percent (75%) reported that the Principles increased or greatly increased the fairness of the e-discovery process (nineteen percent (19%) greatly) and none observed decreased fairness (Table J-16); sixty-six percent (66%) reported that the Principles increased ability to obtain relevant documents and none felt access was diminished. (Table J-9.) The bottom line is that the Principles are perceived to result in more cooperation, more access to needed information and more fairness.

All of the Phase One and Phase Two survey data results, including the results of the August 2010 and March 2012 E-filer Baseline Surveys, are set out in Appendix F.

2. THE PHASE TWO PRINCIPLES RELATING TO THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION IMPLEMENTED BY ORDERS OF THE PARTICIPATING JUDGES

(Revised as Part of Phase Two on August 1, 2010)

General Principles

Principle 1.01 (Purpose)

The purpose of these Principles is to assist courts in the administration of Federal Rule of Civil Procedure 1, to secure the just, speedy, and inexpensive determination of every civil case, and to promote, whenever possible, the early resolution of disputes regarding the discovery of electronically stored information ("ESI") without Court intervention. Understanding of the feasibility, reasonableness, costs, and benefits of various aspects of electronic discovery will inevitably evolve as judges, attorneys and parties to litigation gain more experience with ESI and as technology advances.

Principle 1.02 (Cooperation)

An attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

Principle 1.03 (Discovery Proportionality)

The proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C) should be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable.

Early Case Assessment Principles

Principle 2.01 (Duty to Meet and Confer on Discovery and to Identify Disputes for Early Resolution)

(a) Prior to the initial status conference with the Court, counsel shall meet and discuss the application of the discovery process set forth in the Federal Rules of Civil Procedure and these Principles to their specific case. Among the issues to be discussed are:

(1) the identification of relevant and discoverable ESI and documents, including methods for identifying an initial subset of sources of ESI and documents that are most likely to contain the relevant and discoverable information as well as methodologies for culling the relevant and discoverable ESI and documents from that initial subset (*See* Principle 2.05);

(2) the scope of discoverable ESI and documents to be preserved by the parties;

(3) the formats for preservation and production of ESI and documents;

(4) the potential for conducting discovery in phases or stages as a method for reducing costs and burden; and

(5) the potential need for a protective order and any procedures to which the parties might agree for handling inadvertent production of privileged information and other privilege waiver issues pursuant to Rule 502(d) or (e) of the Federal Rules of Evidence.

(b) Disputes regarding ESI that counsel for the parties are unable to resolve shall be presented to the Court at the initial status conference, Fed. R. Civ. P. Rule 16(b) Scheduling Conference, or as soon as possible thereafter.

(c) The attorneys for each party shall review and understand how their client's data is stored and retrieved before the meet and confer discussions in order to determine what issues must be addressed during the meet and confer discussions.

(d) If the Court determines that any counsel or party in a case has failed to cooperate and participate in good faith in the meet and confer process or is impeding the purpose of these Principles, the Court may require additional discussions prior to the commencement of discovery, and may impose sanctions, if appropriate.

Principle 2.02 (E-Discovery Liaison(s))

In most cases, the meet and confer process will be aided by participation of an e-discovery liaison(s) as defined in this Principle. In the event of a dispute concerning the preservation or production of ESI, each party shall designate an individual(s) to act as e-discovery liaison(s) for purposes of meeting, conferring, and attending court hearings on the subject. Regardless of whether the e-discovery liaison(s) is an attorney (in-house or outside counsel), a third party consultant, or an employee of the party, the e-discovery liaison(s) must:

(a) be prepared to participate in e-discovery dispute resolution;

(b) be knowledgeable about the party's e-discovery efforts;

(c) be, or have reasonable access to those who are, familiar with the party's electronic systems and capabilities in order to explain those systems and answer relevant questions; and

(d) be, or have reasonable access to those who are, knowledgeable about the technical aspects of e-discovery, including electronic document storage, organization, and format issues, and relevant information retrieval technology, including search methodology.

Principle 2.03 (Preservation Requests and Orders)

(a) Appropriate preservation requests and preservation orders further the goals of these Principles. Vague and overly broad preservation requests do not further the goals of these Principles and are therefore disfavored. Vague and overly broad preservation orders should not be sought or entered. The information sought to be preserved through the use of a preservation letter request or order should be reasonable in scope and mindful of the factors set forth in Rule 26(b)(2)(C).

(b) To the extent counsel or a party requests preservation of ESI through the use of a preservation letter, such requests should attempt to ensure the preservation of relevant and discoverable information and to facilitate cooperation between requesting and receiving counsel and parties by transmitting specific and useful information. Examples of such specific and useful information include, but are not limited to:

(1) names of the parties;

(2) factual background of the potential legal claim(s) and identification of potential cause(s) of action;

(3) names of potential witnesses and other people reasonably anticipated to have relevant evidence;

(4) relevant time period; and

(5) other information that may assist the responding party in assessing what information to preserve.

(c) If the recipient of a preservation request chooses to respond, that response should provide the requesting counsel or party with useful information regarding the preservation efforts undertaken by the responding party. Examples of such useful and specific information include, but are not limited to, information that:

(1) identifies what information the responding party is willing to preserve and the steps being taken in response to the preservation letter;

(2) identifies any disagreement(s) with the request to preserve; and

(3) identifies any further preservation issues that were not raised.

(d) Nothing in these Principles shall be construed as requiring the sending of a preservation request or requiring the sending of a response to such a request.

Principle 2.04 (Scope of Preservation)

(a) Every party to litigation and its counsel are responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control. Determining which steps are reasonable and proportionate in particular litigation is a fact specific inquiry that will vary from case to case. The parties and counsel should address preservation issues at the outset of a case, and should continue to address them as the case progresses and their understanding of the issues and the facts improves.

(b) Discovery concerning the preservation and collection efforts of another party may be appropriate but, if used unadvisedly, can also contribute to the unnecessary expense and delay and may inappropriately implicate work product and attorney-client privileged matter. Accordingly, prior to initiating such discovery a party shall confer with the party from whom the information is sought concerning: (i) the specific need for such discovery, including its relevance to issues likely to arise in the litigation; and (ii) the suitability of alternative means for obtaining the information. Nothing

herein exempts deponents on merits issues from answering questions concerning the preservation and collection of their documents, ESI, and tangible things.

(c) The parties and counsel should come to the meet-and-confer conference prepared to discuss the claims and defenses in the case including specific issues, time frame, potential damages, and targeted discovery that each anticipates requesting. In addition, the parties and counsel should be prepared to discuss reasonably foreseeable preservation issues that relate directly to the information that the other party is seeking. The parties and counsel need not raise every conceivable issue that may arise concerning their preservation efforts; however, the identification of any such preservation issues should be specific.

(d) The following categories of ESI generally are not discoverable in most cases, and if any party intends to request the preservation or production of these categories, then that intention should be discussed at the meet and confer or as soon thereafter as practicable:

(1) "deleted," "slack," "fragmented," or "unallocated" data on hard drives;

(2) random access memory (RAM) or other ephemeral data;

(3) on-line access data such as temporary internet files, history, cache, cookies, etc.;

(4) data in metadata fields that are frequently updated automatically, such as last-opened dates;

(5) backup data that is substantially duplicative of data that is more accessible elsewhere; and

(6) other forms of ESI whose preservation requires extraordinary affirmative measures that are not utilized in the ordinary course of business.

(e) If there is a dispute concerning the scope of a party's preservation efforts, the parties or their counsel must meet and confer and fully explain their reasons for believing that additional efforts are, or are not, reasonable and proportionate, pursuant to Rule 26(b)(2)(C). If the parties are unable to resolve a preservation issue, then the issue should be raised promptly with the Court.

Principle 2.05 (Identification of Electronically Stored Information)

(a) At the Rule 26(f) conference or as soon thereafter as possible, counsel or the parties shall discuss potential methodologies for identifying ESI for production.

(b) Topics for discussion may include, but are not limited to, any plans to:

(1) eliminate duplicative ESI and whether such elimination will occur only within each particular custodian's data set or whether it will occur across all custodians;

(2) filter data based on file type, date ranges, sender, receiver, custodian, search terms, or other similar parameters; and

(3) use keyword searching, mathematical or thesaurus-based topic or concept clustering, or other advanced culling technologies.

Principle 2.06 (Production Format)

(a) At the Rule 26(f) conference, counsel and the parties should make a good faith effort to agree on the format(s) for production of ESI (whether native or some other reasonably usable form). If counsel or the parties are unable to resolve a production format issue, then the issue should be raised promptly with the Court.

(b) The parties should confer on whether ESI stored in a database or a database management system can be produced by querying the database for discoverable information, resulting in a report or a reasonably usable and exportable electronic file for review by the requesting counsel or party.

(c) ESI and other tangible or hard copy documents that are not text-searchable need not be made text-searchable.

(d) Generally, the requesting party is responsible for the incremental cost of creating its copy of requested information. Counsel or the parties are encouraged to discuss cost sharing for optical character recognition (OCR) or other upgrades of paper documents or non-text-searchable electronic images that may be contemplated by each party.

Education Principles

Principle 3.01 (Judicial Expectations of Counsel)

Because discovery of ESI is being sought more frequently in civil litigation and the production and review of ESI can involve greater expense than discovery of paper documents, it is in the interest of justice that all judges, counsel and parties to litigation become familiar with the fundamentals of discovery of ESI. It is expected by the judges adopting these Principles that all counsel will have done the following in connection with each litigation matter in which they file an appearance:

(1) Familiarize themselves with the electronic discovery provisions of the Federal Rules of Civil Procedure, including Rules 26, 33, 34, 37, and 45, as well as any applicable State Rules of Procedure;

(2) Familiarize themselves with the Advisory Committee Report on the 2006 Amendments to the Federal Rules of Civil Procedure, available at http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf; and

(3) Familiarize themselves with these Principles.

Principle 3.02 (Duty of Continuing Education)

Judges, attorneys and parties to litigation should continue to educate themselves on electronic discovery by consulting applicable case law, pertinent statutes, the Federal Rules of Civil Procedure, the Federal Rules of Evidence, The Sedona Conference® publications relating to electronic discovery[1], additional materials available on web sites of the courts[2], and of other organizations[3] providing educational information regarding the discovery of ESI.[4]

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[1] http://www.thesedonaconference.org/content/miscFiles/publications_html?grp=wgs110

[2] E.g. http://www.ilnd.uscourts.gov/home/

[3] E.g. http://www.7thcircuitbar.org, www.fjc.gov (under Educational Programs and Materials)

[4] E.g. http://www.du.edu/legalinstitute

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4. BACKGROUND REGARDING PHASES ONE AND TWO

A. Formation of the Committee

The Committee was first conceived by Chief U.S. District Judge James F. Holderman and U.S. Magistrate Judge Nan R. Nolan. Together they appointed lawyers and non-lawyers who are experts in the field of electronically stored information ("ESI") to serve on the Committee. The idea was to get a diverse collection of viewpoints on the fairest ways to address the issues associated with ESI in discovery. The Committee quickly expanded as word and interest among members of the Seventh Circuit legal community spread. The Seventh Circuit Bar Association provided support and liaison representatives, who became members of the Committee. Also, the Illinois State Bar Association's Civil Practice Section and Federal Civil Practice Section are represented on the Committee. Other bar associations, including the Chicago Bar Association and the Federal Bar Association - Chicago Chapter, have lent support to the Seventh Circuit Electronic Discovery Pilot Program.

The Committee members include practitioners from the full spectrum of the bar (plaintiff, defense, and government) who are leaders in the area of electronic discovery, in-house counsel at companies that regularly face the challenges of discovery in organizations with large and complex electronic systems, and experts from electronic discovery vendors who routinely collect and process electronically stored information.

B. Committee's Goals for Phase One

At its initial meeting on May 20, 2009, the Committee members identified the need to foster a better balance between discovery costs and efforts to reach a "just, speedy, and inexpensive" determination of cases as intended by the Federal Rules of Civil Procedure. Fed R. Civ. P. 1.

With that primary goal in mind, the Committee focused on three (3) related goals for Phase One of the Committee's Pilot Program: (1) develop guiding Principles for the discovery of ESI that are fair to all parties and minimize the cost and burden of discovery in proportion to the litigation; (2) implement those Principles in actual pending or filed court cases; and (3) survey the judges and lawyers involved in the cases to determine the effectiveness of the Principles, solicit opinions regarding improvements that could be made to the Principles, and assess whether the Principles fulfilled the Committee's goals.

With the continuing support and assistance of former Justice of the Colorado Supreme Court, Rebecca L. Kourlis, the Executive Director of the Institute for Advancement of the American Legal System at the University of Denver, and Kenneth J. Withers, the Director of Judicial Education and Content for The Sedona Conference®, the Committee moved vigorously and expeditiously in pursuit of its goals and, on September 16, 2009, produced the Committee's Principles Relating to the Discovery of Electronically Stored Information ("Principles").

C. Action on the Goals for Phase One

The Committee members identified three (3) major areas of emphasis and formed three (3) corresponding subcommittees: the Preservation Subcommittee, co-chaired by James Montana, Jr. and Thomas Lidbury; the Early Case Assessment Subcommittee, co-chaired by Karen Quirk and Thomas Lidbury; and the Education Subcommittee, co-chaired by Mary Rowland and Kathryn Kelly. The Survey Subcommittee, co-chaired by Joanne McMahon and Natalie Spears, was also created as Phase One progressed. Each Committee member joined at least one — and often two — subcommittees. The subcommittees were tasked with developing discovery Principles and the methodology to test them in the Pilot Program. The subcommittees held dozens of meetings, and subcommittee members devoted much time to drafting the proposed Principles. In early 2010, the Communications and Outreach Subcommittee was formed to help centralize the flow of information regarding the Pilot Program to the press and general public. The full Committee held three (3) meetings after the initial meeting (June 24, August 26, and September 16, 2009) to review the progress of the subcommittees as well as to refine and complete the drafting of the proposed Principles and a standing order to be entered in participating Phase One cases. In the course of the Committee's discussions, Thomas M. Staunton of Miller Shakman & Beem LLP served as the recording secretary for the Committee and prepared minutes of the meetings.

The Principles adopted by the Seventh Circuit Electronic Discovery Committee on September 16, 2009, for Phase One of the Pilot Program are set forth in the May 1, 2010 Final Report on Phase one, which can be found on the Pilot Program's Web site, www.DiscoveryPilot.com. The goal of the Principles are to continue to incentivize early and informal information exchange between counsel on commonly encountered issues relating to evidence preservation and discovery, both paper and electronic, as required by Federal Rule of Civil Procedure 26(f)(2). Too often these exchanges begin with unhelpful demands for the preservation of all data, which are routinely followed by exhaustive lists of types of storage devices. Such generic demands lead to generic objections that similarly fail to identify issues concerning the preservation and discovery of evidence in the case. As a result, counsel for the parties often fail to focus on identifying specific sources of evidence that are likely to be sought in discovery but that may be problematic, unduly burdensome, or costly to preserve or produce.

Because ESI has become a source of discovery disputes, there have been calls for cooperation in the pretrial discovery process, such as The Sedona Conference® Cooperation Proclamation. The Pilot Program Principles are intended not just to call for cooperation but also to encourage the cooperative exchange of information on evidence preservation and discovery. Therefore, education programs were developed. A list of the Phase one Programs, along with an up-to-date listing of electronic discovery case law are on the Pilot Programs Web site: www.DiscoveryPilot.com.

D. Developments During Phase Two

Phase Two of the Pilot Program ran from May 2010 through May 2012. During Phase Two, the Committee worked to expand the scope of the Pilot Program by moving it beyond litigation pending in the Northern District of Illinois to include litigation in the other six (6) districts within the Seventh

Circuit. The Committee also dramatically increased the number of participating judges, and along with those additional judges came a significant increase in the number of participating attorneys and the number of cases implementing the Principles across the Seventh Circuit. The Committee also worked to become more effective by expanding its scope, by adding subcommittees, by developing its web site, www.DiscoveryPilot.com, and introducing the concept of an e-discovery mediation program. Additionally, subcommittees were formed to meet the need for a coordinated response to national interest in the Pilot Program, to address the need of ever-advancing technology issues, and to address issues unique to discovery in criminal, as opposed to civil, cases.

During Phase Two, the Committee expanded its reach and expertise by adding attorneys and other experts from outside the Seventh Circuit and from segments that may have had less representation during Phase One, such as in-house counsel, members of the plaintiffs' bar, and lawyers practicing primarily criminal law. The Committee has increased in size from about fifty (50) members and advisors by the end of Phase One to over one hundred fifty (150) members and advisors today.

Judicial participation also expanded dramatically during Phase Two throughout the Seventh Circuit. In Phase One, five (5) district court judges and eight (8) magistrate judges — all from the Northern District of Illinois — implemented the Principles in ninety-three (93) federal civil cases involving approximately two hundred eighty-five (285) lead counsel. During Phase Two, the Pilot Program included judges from other districts within the Seventh Circuit. A total of forty (40) judges, including seventeen (17) district judges, twenty-one (21) magistrate judges, and two (2) bankruptcy judges, participated in Phase Two. The number of cases in the Pilot Program more than tripled, to two hundred ninety-six (296) cases. The number of attorneys listed as lead counsel in those cases nearly tripled, to seven hundred eighty-seven (787).

The Committee also added new subcommittees during Phase Two.

The Technology Subcommittee, which is comprised of seasoned technology thought-leaders, was designed to keep up with rapidly evolving electronic record retention and discovery technology and to further advance the bench and bar's understanding of that technology.

The Web site Subcommittee designed and manages the Pilot Program's web site, www.DiscoveryPilot.com, which was launched on May 1, 2011, with the support and expertise of Justia Inc. of Mountain View, California. The web site contains a host of information about the Pilot Program, the Committee, and the survey process. It also contains a number of valuable e-discovery resources, including links to each of the Committee's webinars; summaries of relevant e-discovery case law; links to relevant rules, handbooks, and publications; and other resources.

The National Outreach Subcommittee was formed to help the Committee make use of and respond to the tremendous interest the Pilot Program has generated among judges, attorneys, and business people across the country.

The Criminal Discovery Subcommittee was formed to address issues that arise during discovery in criminal cases. The Committee observed that criminal cases present electronic discovery issues that are, in many ways, distinct from the issues presented in civil cases. The Committee also determined that criminal cases present a unique opportunity for study, both because the law in that area is three (3) to four (4) years behind the law governing civil cases and because of the relative lack of attention that has been paid to e-discovery in criminal cases.

The E-Mediation Subcommittee was proposed to consider the possibility and feasibility of adding an e-discovery mediation program during Phase Three. Although lawyers practicing in the Northern District of Illinois have made substantial efforts to educate themselves about electronic discovery, the fast pace of adoption of new technologies continues to create significant barriers. Even a lawyer who is highly knowledgeable in some technologies may become involved in a dispute involving unfamiliar technology. The Committee believed that a mediation program might reduce the time the judges must devote to discovery disputes, and enable disputes to be resolved more quickly and at a lower cost to the parties.

Finally, to conclude Phase Two, the Committee, in conjunction with experts headquartered at the Federal Judicial Center of the United States Courts, conducted a second set of surveys, in February and March 2012, to gauge the effect and effectiveness of the Principles and to provide guidance for Phase Three. Foremost, as a follow up to the committee's survey of those participating in Phase One, the Committee conducted a Phase Two Judge Survey of the forty (40) judges participating in Phase Two of the Pilot Program, and a Phase Two Attorney Survey of the seven hundred eighty-seven (787) attorneys participating in Phase Two of the Pilot Program. Additionally, the Committee in March 2012 conducted a separate E-filer Baseline Survey of all attorneys registered as e-filers in the seven (7) districts in the Seventh Circuit. This survey has provided valuable information when compared to the results of the first E-filer Baseline Survey conducted a year and a half earlier in August 2010.

5. SUBCOMMITTEES

The Committee has organized itself into several subcommittees charged with taking the lead on specific projects. These Subcommittees include:

A. Education,

B. Preservation and Early Case Assessment,

C. Criminal Case Discovery,

D. Survey,

E. Communications and Outreach,

F. National Outreach,

G. Membership,

H. Technology, and

I. Web site.

The subcommittees have been busy furthering the mission of the Pilot Program and implementing Phase Two.

A. Education Subcommittee

(1.) Members

Kathryn A. Kelly (Co-Chair)
Mary M. Rowland (Co-Chair)
Michael Bolton
Kevin Brown
Sean Byrne
Timothy J. Chorvat
Christina Conlin
Brian D. Fagel
Tiffany M. Ferguson
Megan Ferraro
Todd H. Flaming
Alisa May Ittner Harrison
Brandon D. Hollinder
Colleen Kenney
Christopher Q. King
Cameron Krieger
Cinthia Granados Motley
Adrienne B. Naumann
Chad Riley
Michael Rothmann
Greg Schodde
Jeffrey C. Sharer
Howard Sklar
Natalie J. Spears
Tomas Thompson
Martin Tully
Kelly Twigger
Kelly M. Warner
P. Shawn Wood
Christina M. Zachariasen
Zachary Ziliak

(2.) Subcommittee's Charge and Continuing Role

The Education Subcommittee is the first of the initial three (3) subcommittees formed during the full Committee's first meeting in May 2009. The Education Subcommittee was created because of the Committee members' belief that many of the problems that arise in connection with electronic discovery stem from a lack of expertise by many lawyers. While this lack of expertise is understandable, lawyers and judges, to keep pace in today's technological environment, must now advance their level of knowledge because most discoverable information is now electronically stored. The Education Subcommittee's initial function was to conceive and draft the educational Principles that are now being put to the test in the Pilot Program (Principles 3.01 and 3.02). After the Principles were adopted, the Education Subcommittee was tasked with organizing educational programs, often in coordination with the Communications and Outreach Subcommittee. The Subcommittee organized four (4) programs during Phase One and presented five (5) programs during Phase Two as well as another five (5) live seminars. The Subcommittee also created and maintains a compilation of case law concerning electronic discovery issues from the Seventh Circuit, along with seminal electronic discovery cases from around the country. This valuable compilation is

available to practitioners free of charge on the Committee's web site. The Education Subcommittee routinely updates this compilation to keep it current.

The Education Subcommittee remains committed to providing free education to the bar about handling electronic discovery and fulfilling their legal obligations. The Subcommittee throughout Phase One and Phase Two conceived, organized and produced several educational opportunities including six (6) free webinars, which remain available on demand at www.DiscoveryPilot.com.

(a.) Webinars

(1.) February 17, 2010 – "Re-forming Discovery: The Seventh Circuit E-Discovery Pilot Program"

During Phase One, the Subcommittee, the Seventh Circuit Bar Association, and Technology Concepts & Design, Inc. (TCDI®) produced the Pilot Program's initial one-hour webinar that was broadcast on February 17, 2010, in a question-and-answer format, and described the highlights of the Principles and the motivation behind several of the provisions. The webinar was titled "Re-forming Discovery: The Seventh Circuit E-Discovery Pilot Program." To reach the maximum number of lawyers, the Subcommittee partnered with LAW.COM to broadcast the webinar. Over 1,000 registrants heard from Chief Judge James F. Holderman, Magistrate Judge Nan R. Nolan, and Committee members Thomas Lidbury of Drinker Biddle & Reath and Alexandra Buck of Bartlit Beck Herman Palenchar & Scott. The panel not only described the Principles, but also explained the impetus for certain provisions and highlighted the requirements of others. Attendees, who received CLE credit, had an opportunity to ask questions, and the subcommittee provided a written response to every question submitted. Attendees were also encouraged to comment on the quality of the webinar and to propose future topics.

(2.) April 28, 2010 – "You and Your Client: Communicating about E-Discovery"

Given the overwhelming response to the initial webinar and based upon a thorough review of the written comments from the attendees, the Subcommittee, on April 28, 2010, broadcast the Pilot Program's second webinar with TCDI, titled "You and Your Client: Communicating about E-Discovery." This webinar focused on a lawyer's obligation to understand a client's systems and to use that knowledge to facilitate the e-discovery process. Over three thousand (3,000) participants heard from Committee members Chris King of SNR Denton, Tiffany Ferguson of Pugh, Jones, Johnson & Quandt, P.C., Tom Staunton of Miller Shakman & Beem, LLP, and Michael Bolton of

Baxter Healthcare Corp., about the initial and essential steps counsel must take in order to understand his or her clients' electronic data and the discovery obligations which flow from it.

(3.) April 6, 2011 – "What Everyone Should Know About the Mechanics of E-Discovery"

During Phase Two, the Subcommittee, in conjunction with Merrill Corporation, presented another free-of-charge webinar on April 6, 2011, titled "What Everyone Should Know About the Mechanics of E-Discovery," featuring Committee members Ronald Lipinski of Seyfarth Shaw LLP and Daniel Graham of Clark Hill PLC. Through the cooperation of the chief federal district judges in Illinois, Wisconsin, and Indiana, ECF users in the federal district courts in all three (3) states were invited to attend. Over three thousand (3,000) participants registered for the webinar.

(4.) November 30, 2011 – "The Ethics of E-Discovery"

On November 30, 2011 the Subcommittee, in conjunction with Wilson Elser, presented another free webinar titled "The Ethics of E-Discovery." The panel of participants were U.S. Magistrate Judge Mark J. Dinsmore of the Southern District of Indiana, Rachel Lei of GATX Corporation, and Committee members Debra Bernard of Perkins Coie LLP, Timothy Chorvat of Jenner & Block LLP, and Cinthia Motley of Wilson Elser. Over two thousand seven hundred (2,700) people registered for the webinar.

(5.) March 28, 2012 – "ESI 101"

On March 28, 2012, in cooperation with McAndrews Held & Malloy, LTD, and its partner Gregory Schodde, the Subcommittee presented "ESI 101." Over one thousand (1,000) lawyers tuned in for this in-depth discussion of the technological aspects of ESI. As with all the other webinars and presentations sponsored by the Subcommittee, this program and any related materials are available on the Pilot Program's web site www.DiscoveryPilot.com.

(b.) Live Seminars

In addition to the free webinars, which remain available at www.DiscoveryPilot.com, the Subcommittee during Phase Two presented live seminars at various locations in the Seventh Circuit.

(1.) January 18, 2011, October 18, 2011, and April 18, 2012 – E-Discovery Expert Attorney Jonathan Redgrave presented "The 4 P's of Electronic Discovery: Preservation, Proportionality, Privilege, and Privacy"

On January 22, 2011, the Subcommittee in conjunction with attorney Jonathan Redgrave, an expert and prominent thought-leader in the field of electronic discovery, presented a free in-person seminar titled "The 4 P's of Electronic Discovery: Preservation, Proportionality, Privilege, and Privacy." With a standing-room-only audience of over three hundred (300) attorneys in the Dirksen U.S. Courthouse in Chicago, Mr. Redgrave spoke about the concepts of preservation, proportionality, privilege, and privacy in the context of the Pilot Program Principles and recent case law. To accommodate the large number of interested parties who were unable to attend this seminar, Mr. Redgrave provided an equally outstanding encore presentation on October 18, 2011, which was digitally recorded and is available at www.DiscoveryPilot.com. Once again, by popular demand, Mr. Redgrave, on April 18, 2012, graciously participated in a video broadcast of this program, followed by an insightful question and answer section.

(2.) February 28, 2011 and April 11, 2011 – "The Seventh Circuit E-Discovery Pilot Program: Principles and Practical Applications"

On February 28, 2011, in Milwaukee, Wisconsin, the Subcommittee presented "The Seventh Circuit E-Discovery Pilot Program: Principles and Practical Applications." The judicial panelists were U.S. Chief District Judge Charles Clevert, Jr. of the Eastern District of Wisconsin and U.S. Magistrate Judge Nan Nolan of the Northern District of Illinois, along with Committee members Timothy Edwards of Axley Brynelson LLP, James McKeown of Foley & Lardner LLP, and Richard Moriarty, an Assistant Attorney General in Wisconsin. On April 11, 2011, in Madison, Wisconsin, the Subcommittee presented this live seminar again with judicial panelists U.S. Magistrate Judge Stephen Crocker of the Western District of Wisconsin and U.S. Magistrate Judge Nan Nolan, along with Committee members Timothy Edwards, James McKeown, and Richard Moriarty.

(3.) September 8, 2011 – "Mock Rule 16 Meet and Confer"

On September 8, 2011, the Subcommittee teamed with Cohasset Group and The Sedona Conference®, and presented a Mock Rule 16 Meet and Confer. With Ken Withers of The Sedona Conference® moderating, the Subcommittee was honored to have U.S. District Judge Shira Scheindlin of the Southern District of New York, and a nationally recognized expert on electronic discovery, as well as Craig Ball and John Jessen, both experts in electronically stored information, participate in the event. Two Pilot Program pioneers, Tom Lidbury of Drinker Biddle & Reath and

Mary Rowland of Hughes Socol Piers Resnick & Dym, took on the roles of opposing counsel. The hypothetical presented a myriad of disputed discovery issues based upon litigation arising from a toxic chemical spill. The program was presented in the Dirksen U.S. Courthouse, and it was simultaneously videotaped by the Cohasset Group. The program has been edited and is now available on the web site of The Sedona Conference® through a link on www.DiscoveryPilot.com.

(c.) Other information on DiscoveryPilot.com

The Pilot Program's web site has a vast array of information including news items on e-discovery and a highly valuable up-to-date compendium of case law from judges in the Seventh Circuit and across the country. Committee member Christina M. Zachariasen of Navigant maintains this key feature of the Pilot Program's web site. It is an outstanding resource for all attorneys, including in-house counsel, who must address e-discovery issues.

More educational opportunities are being planned for Phase Three of the Pilot Program.

B. Preservation and Early Case Assessment Subcommittee

(1.) Members

Thomas A. Lidbury (Co-Chair)
Karen Caraher Quirk (Co-Chair)
James S. Montana, Jr. (Co-Chair)

George S. Bellas	Reuben L. Hedlund
Debra R. Bernard	Arthur J. Howe
Matthew A. Bills	Michael Kanovitz
Kevin S. Brown	Joshua Karsh
Alexandra G. Buck	Samara Kaufman
Timothy J. Chorvat	Daniel J. Kurowski
KendrIc M. Cobb	Pauline Levy
Ethan M. Cohen	Ronald L. Lipinski
Christina Conlin	Joanne McMahon
Cathy DeGenova-Carter	Bruce A. Radke
Elizabeth H. Erickson	Anupam Razdan
Jennifer Freeman	Jeffrey C. Sharer
Arthur Gollwitzer III	Howard Sklar
Rex Gradeless	Thomas Staunton
Daniel Graham	Kelly M. Warner
Marie Halpin	Marni Willenson

(2.) Subcommittee's Charge and Continuing Role

The Preservation Subcommittee and Early Case Assessment Subcommittee were two of the initial three (3) subcommittees formed at the full Committee's first meeting in May of 2009. Their function has been to conceive and draft the procedural Principles (Principles 1.01 through 2.06) that have been put to the test in the Pilot Program, and to draft revisions to Principles 1.01 through 2.06 based on the findings in Phase One of the Pilot Program. As these two subcommittees performed their tasks it became clear that there is significant overlap between their charges. Matters pertaining to evidence preservation often overlap with matters concerning early case assessment, and vice versa. As a result, throughout the Pilot Program the two subcommittees worked very closely together to develop a cohesive framework. In Phase Two, these two Subcommittees were formally merged into one Subcommittee.

The Preservation and Early Case Assessment Subcommittee has been actively involved in analyzing survey data developed by the Survey Subcommittee in Phases One and Two of the Pilot Program. This Subcommittee will have the primary responsibility of drafting any revisions to the procedural Principles that the Committee deems appropriate as the Pilot Program progresses.

C. Criminal Discovery Subcommittee

(1.) Members

David Glockner (Co-Chair)
Beth Gaus (Co-Chair)
Meghan Morrissey Stack (Co-Chair)
Sergio Acosta
Molly Armour
John Beal
Debra R. Bernard
Gabriel Bankier Plotkin
Justin Murphy
Barry Spevack

(2.) Subcommittee's Charge and Continuing Role

The Criminal Discovery Subcommittee was formed to expand the reach of the Seventh Circuit's Electronic Discovery Pilot Program to the practice of criminal law. The Subcommittee's first goal is to publicize the recently-issued "Recommendations and Strategies for ESI Discovery," which was developed by the Joint Electronic Technology Working Group, composed of representatives from the Justice Department, Federal Defender Program, and private attorneys who accept Criminal Justice Act appointments, as well as liaisons from the courts. As part of this effort, the Subcommittee will be hosting a live event on June 8, 2012, featuring as speakers national discovery coordinators from both the Department of Justice and the Federal Defender Program. This event is intended to educate criminal practitioners about these national protocols, and to help facilitate the expanding use of electronic discovery in criminal cases. The Subcommittee's second goal is to bring together criminal practitioners from both the prosecution and defense bars, to identify frequently occurring electronic discovery issues, and to work collaboratively to address those problems. Finally, the Subcommittee also intends to develop and make available additional educational resources, to assist in making electronic discovery more efficient, secure, and less costly for criminal practitioners.

D. Survey Subcommittee

(1.) Members

Natalie J. Spears (Co-Chair)
Thomas Staunton (Incoming Co-Chair)
Joanne McMahon (Outgoing Co-Chair)
Debra Bernard
Karen Coppa
Rebecca Elmore
Tiffany Ferguson
Marie Halpin
Richard Briles Moriarty
Adrienne B. Naumann

(2.) Subcommittee's Charge and Continuing Role

Collecting feedback from the judiciary and members of the bar relating to the Principles and the other work of the Seventh Circuit Electronic Discovery Pilot Program is a critical aspect of the Pilot Program's mission. To this end, immediately following the adoption of the Principles on September 16, 2009, the Committee formed the Survey Subcommittee. The Survey Subcommittee initially was tasked with developing a survey to assess the effectiveness of the Principles and gather reactions and information from the lawyers and judges participating in Phase One of the Pilot Program.

The May 2010 Pilot Program Report on Phase One sets forth the results of the survey conducted by the Survey Subcommittee of those who participated in Phase One of the Program. The Subcommittee received tremendous assistance and support during Phase One from the Institute for Advancement of the American Legal System at the University of Denver ("IAALS"), which led the development of the Phase One survey questionnaire and assisted with analysis of the survey results. The FJC administered the Phase One survey and also provided vital input during the survey questionnaire development process.

Following the Phase One Survey, in the Summer of 2010, the Survey Subcommittee worked with the FJC to develop and administer a new E-filer Baseline Survey of electronic-filing attorneys in the district courts of the Seventh Circuit. The purpose of the E-filer Baseline Survey was to assess, among other things, attorneys' views on the level of e-discovery involved in their cases, their own experience with and general knowledge about e-discovery issues, the proportionality of costs incurred as a result of e-discovery issues and the level of cooperation experienced with opposing

counsel on such issues. In August 2010, the initial E-filer Baseline Survey was sent to over twenty-five thousand (25,000) attorneys who were e-filers in at least one of the seven (7) districts in the Seventh Circuit and was completed by over six thousand (6,000) of those attorneys. The same E-filer Baseline Survey was then repeated in March 2012, with an added series of questions focused on attorneys' awareness of the Pilot Program and of the educational and other resources provided by the Program. The March 2012 E-filer Baseline Survey was sent to over twenty-five thousand (25,000) attorneys who were e-filers in at least one of the seven (7) districts in the Seventh Circuit and was completed by over six thousand five hundred (6,500) attorneys, for a response rate of twenty-six percent (26%). The Phase One and Phase Two E-filer Baseline Survey results are attached to this Report in Appendix F.2.b.

In addition, in March 2012, the Survey Subcommittee, again with critical support from the FJC, conducted a separate survey of the attorneys and judges participating in the Pilot Program to assess the effectiveness of the Principles and Phase Two of the Pilot Program. The Subcommittee reviewed and refined the Phase One judges' and attorneys' survey questionnaires, mainly to add areas of inquiry, as the vast majority of the original survey questions remained the same in both surveys in order to allow for potential comparison to the Phase One 2010 survey results. The Phase Two Attorney Survey results and the Phase Two Judge Survey results, along with analysis, is contained in the May 2012 Pilot Program Report on Phase Two.

E. Communications and Outreach Subcommittee

(1.) Members

Alexandra G. Buck (Co-Chair)
Steven W. Teppler (Co-Chair)
George S. Bellas
Sean Byrne
Timothy J. Chorvat
Claire Covington
Moira Dunn
Michael Gifford
Brandon D. Hollinder
Vanessa Jacobsen
Colleen M. Kenney
Christopher King
Richard Briles Moriarty
Steven Puiszis
Karen Caraher Quirk
Teri Cotton Santos
Jeffrey C. Sharer
Tomas Thompson
Allison Walton

(2.) Subcommittee's Charge and Continuing Role

The Communications and Outreach Subcommittee's charge is to promote awareness of and provide education about the Pilot Program to attorneys and judges throughout the various federal district courts within the Seventh Circuit, to the Illinois state courts, and to the bench and bar of other federal and state jurisdictions. This subcommittee generates and provides a growing repository for presentations and other educational material in connection with the Pilot Program, and functions as the point of contact for media inquiries and speaker referrals.

Through the Communication and Outreach Subcommittee, members of the Committee have given over fifty (50) presentations about the Pilot Program in more than twenty (20) states and internationally since 2010. The Pilot Program has also been the subject of dozens of articles, blogs, and continuing legal education programs.

The subcommittee has provided, and will update as necessary, orientation packets for federal judges to learn about the Pilot Program and either participate in the Pilot Program or start a similar program in their own circuits. For a complete list of articles and speaking engagements about the Pilot Program, please visit the program's web site: www.DiscoveryPilot.com.

The Communications and Outreach Subcommittee will continue to be the point of contact for media inquiries, speaker referrals, and education about the Pilot Program

F. National Outreach Subcommittee

(1.) Members

Arthur Gollwitzer III (Chair)

Patrick Ardis	Kelly Griffith
Randolph Barnhart	Maura Grossman
Shannon Brown	Jaime Jackson
Michael Carbone	Steve McGrath
Jason Cashio	Mark E. (Rick) Richardson
Li Chen	Teri Cotton Santos
Cass Christenson	Mathieu Shapiro
Kelly Clay	Howard Sklar
Richard Denney	Allison Walton
Adrian Fontecilla	Joy Woller

(2.) Subcommittee's Charge and Continuing Role

The National Outreach Subcommittee is a subcommittee of the Communications and Outreach Subcommittee, focused on publicizing and promoting the Pilot Program outside of the Seventh Circuit. The National Outreach Subcommittee identifies and contacts leaders in the field of ESI discovery around the country, including noted authors and speakers, specialized organizations and bar associations, and conference organizers. The subcommittee provides these leaders with information about the Pilot Program and encourages publication of works and organization of events that address the Pilot Program. The subcommittee also encourages its members to pass along Pilot Program results by word-of-mouth and by using the Principles in their own cases. Finally, the subcommittee looks for interested individuals from outside of the Seventh Circuit to refer to the Membership Subcommittee.

In Phase Three of the Pilot Program, the National Outreach Subcommittee plans to continue its grass-roots efforts to publicize the Pilot Program. In addition, the subcommittee will monitor the development of other ESI pilot programs around the country as well as possible amendments to the Federal Rules of Civil Procedure regarding ESI, preservation obligations, and spoliation sanctions. The subcommittee recognizes that there are other approaches to ESI discovery and plans to review those approaches and try to coordinate our efforts with other similar efforts where possible. Finally, the subcommittee will continue to recruit members from around the nation with an eye towards working with other pilot programs and informing those programs about this group's work to date.

G. Membership Subcommittee

(1.) Members

Michael D. Gifford (Co-Chair)
Marie V. Lim (Co-Chair)
Moira K. Dunn (Outgoing Co-Chair)

(2.) Subcommittee's Charge and Continuing Role

The Membership Subcommittee was created after the completion of Phase One. The Membership Subcommittee is charged with seeking and screening potential new members for the Committee and encouraging new members to fully participate in the work of the Committee and its subcommittees. To that end, the subcommittee has developed materials for new members regarding the Committee, its work, and the commitments anticipated of new members. The Membership Subcommittee also coordinates adding new members to the Committee's roster and is available to answer inquiries regarding membership

During Phase One, Committee membership was heavily oriented toward the Northern District of Illinois. At Phase One's close, the Committee had over fifty (50) members, and consisted of trial judges and lawyers, including in-house counsel, private practitioners, government attorneys, academics, and litigation expert consultants. At present, the Committee has doubled in size with more than one hundred (100) members, expanded beyond its initial focus in the Northern District, and includes members outside of the Seventh Circuit. The Committee now has members from all across the Seventh Circuit, and from across the country including Illinois, Indiana, Wisconsin, Arizona, California, Colorado, Florida, Georgia, Louisiana, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and the District of Columbia. As the Committee grows, the Membership Subcommittee will continue to screen potential new members, as well as reach out to current members to affirm continued interest and involvement in the Pilot Program.

H. Technology Subcommittee

(1.) Members

Sean Byrne (Co-Chair)
Tomas M. Thompson (Incoming Co-Chair)
Jennifer Freeman (Outgoing Co-Chair)
Brent Gustafson
Zachary Ziliak

(2.) Subcommittee's Charge and Continuing Role

The Technology Subcommittee's mission is to provide the bar with educational information about the various technologies that are available and how they can be effectively used to improve efficiency and quality in electronic discovery. The Technology Subcommittee is comprised of seasoned technologists and technology thought-leaders including attorneys who are highly sophisticated technologists, in-house technology counsel, information technology professionals, law firm litigation support leaders, and software developers. The Technology Subcommittee assists the Committee in developing educational information which the Committee will make available to the bar free-of-charge through the activities of the Education, Communications and Outreach, and Web site Subcommittees.

I. Web site Subcommittee

(1.) Members

Timothy J. Chorvat (Co-Chair)
Christopher Q. King (Co-Chair)
Alexandra G. Buck
Sean Byrne
Jennifer W. Freeman
Michael D. Gifford
Jeffrey C. Sharer
Martin T. Tully
Christina M. Zachariasen

(2.) Subcommittee's Charge and Continuing Role

The Web site Subcommittee is responsible for designing and managing the Committee's web site, www.DiscoveryPilot.com, which is now the world's window into the Pilot Program.

The DiscoveryPilot.com web site provides the latest information about the Committee's activities, official publications, and educational resources. It is the Committee's primary means of disseminating news and connections to useful resources and helps to tie together the Committee's numerous outreach and educational activities. The Committee provides the web site as a service to the public, the judiciary, litigants, and the bar. The site makes available the Committee's Principles, reports, and contact information for its membership. DiscoveryPilot.com shares news and recent case law from the courts of the Seventh Circuit concerning electronic discovery and related issues, provides round-the-clock access to webinars and other educational materials, and includes links to other locations where further resources are available. Recently, the Committee arranged to add the well-regarded annual Federal E-Discovery Case Law updates from The Sedona Conference®. Members of each of the Committee's subcommittees are able to update applicable portions of the site as frequently as substantive developments warrant.

The Committee launched the DiscoveryPilot.com web site on May 1, 2011. From the time that the Committee was organized in 2009 until May 2011, the Seventh Circuit Bar Association graciously made space available on its web site. The Committee very much appreciates the Seventh Circuit Bar Association's generosity in that regard. As the Committee's work matured and its scope expanded, the Committee decided to create its own web site, under its own domain name,

www.DiscoveryPilot.com, which now permits the Committee to furnish a wide range of substantive materials in an easy-to-use, contemporary format that interested parties can find and recall readily.

The web site has welcomed visitors from locations throughout the United States and around the world. Of the 6,866 visits through April 18, 2012, not surprisingly, nearly half the traffic has come from the Seventh Circuit's business centers (Chicago (with 34% of total visits), Milwaukee (3%), Madison (1.6%) and Indianapolis (2%)) with New York, Denver, St. Louis, Minneapolis and Silicon Valley rounding out the top ten. DiscoveryPilot.com has been accessed by visitors from over eight hundred (800) locations across the U.S. In addition, foreign users from Canada, India, Mexico, the United Kingdom, and other locations for a total of sixty (60) countries have accessed the site.

The DiscoveryPilot.com web site is designed and powered by Justia, located in Mountain View, California, and the Committee greatly appreciates the invaluable time and skill that Justia has donated to that effort.

6. FORTY (40) PHASE TWO JUDGES WHO IMPLEMENTED THE PRINCIPLES WITH STANDING ORDER IN TWO HUNDRED AND NINETY-SIX (296) CIVIL CASES

Starting in the fall of 2010, forty (40) judges implemented the Committee's Phase Two Principles in federal civil cases selected to be part of the Pilot Program. Each judge used his or her individual criteria for selecting the participating cases from among the cases on the judge's docket, with an average of slightly more than seven (7) cases per judge. The testing period of Phase Two ran through March 2012, when surveys were administered to the judges and attorneys in the Phase Two cases.

Forty Phase Two Judges

Participating District Judges
Judge Sarah Evans Barker (S.D. Ind.)
Judge Ruben Castillo (N.D. Ill.)
Judge Edmond Chang (N.D. Ill.)
Chief Judge Charles N. Clevert, Jr. (E.D. Wisc.)
Chief Judge William M. Conley (W.D. Wisc.)
Judge Barbara B. Crabb (W.D. Wisc.)
Judge Robert M. Dow, Jr. (N.D. Ill.)
Judge Gary S. Feinerman (N.D. Ill.)
Judge Joan B. Gottschall (N.D. Ill.)
Chief Judge James F. Holderman (N.D. Ill.)
Judge Virginia M. Kendall (N.D. Ill.)
Judge Matthew F. Kennelly (N.D. Ill.)
Judge Joan Humphrey Lefkow (N.D. Ill.)
Judge Rebecca R. Pallmeyer (N.D. Ill.)
Judge Rudolph T. Randa (E.D. Wisc.)
Judge J.P. Stadtmueller (E.D. Wisc.)
Judge Amy J. St. Eve (N.D. Ill.)

Participating Magistrate Judges
Judge Martin C. Ashman (N.D. Ill.)
Judge David G. Bernthal (C.D. Ill.)
Judge Geraldine Soat Brown (N.D. Ill.)
Judge William E. Callahan, Jr. (E.D. Wisc.)

Judge Jeffrey Cole (N.D. Ill.)
Judge Susan E. Cox (N.D. Ill.)
Judge Stephen L. Crocker (W.D. Wisc.)
Judge Morton Denlow (N.D. Ill.)
Judge Sheila M. Finnegan (N.D. Ill.)
Judge Jeffrey T. Gilbert (N.D. Ill.)
Judge Aaron E. Goodstein (E.D. Wisc.)
Judge Patricia J. Gorence (E.D. Wisc.)
Judge John A. Gorman (C.D. Ill.)
Judge Arlander Keys (N.D. Ill.)
Judge Young B. Kim (N.D. Ill.)
Judge P. Michael Mahoney (N.D. Ill.)
Judge Michael T. Mason (N.D. Ill.)
Judge Nan R. Nolan (N.D. Ill.)
Judge Sidney I. Schenkier (N.D. Ill.)
Judge Maria Valdez (N.D. Ill.)
Judge Donald G. Wilkerson (S.D. Ill.)

Participating Bankruptcy Judges
Judge Carol A. Doyle (N.D. Ill.)
Judge Eugene R. Wedoff (N.D. Ill.)

7. PHASE TWO SURVEY PROCESS

For Phase Two of the Pilot Program, the Survey Subcommittee was tasked with refining the Phase One Survey to develop a Phase Two Survey that would assess the effectiveness of the Principles and gather feedback and information from the lawyers and judges participating in Phase Two of the Program. The Survey Subcommittee also was tasked with implementing an E-filer Baseline Survey of electronic-filing attorneys in the district courts of the Seventh Circuit, to be administered at the completion of Phase One and again at the completion of Phase Two.

The Survey Subcommittee's work would not have been possible without the dedication, assistance, and support of others. The IAALS led the development of the Phase One Survey, whose work largely carried over to the Phase Two Survey. In addition, the FJC not only assisted with all aspects of the refinement and development of the Phase Two Survey, the FJC also administered the main Phase Two Survey and both Phase Two E-filer Baseline Surveys. The Phase Two Survey work ultimately was the product of the FJC's invaluable commitment, resources and collaboration with the Survey Subcommittee. Again, the entire Committee extends its utmost gratitude to IAALS and the FJC, including particular thanks to Emery G. Lee III, Jason A. Cantone, and Margaret S. Williams of the FJC Research Division for their work during Phase Two.

Immediately following the completion of Phase One, in the summer of 2010, the Survey Subcommittee worked with the FJC to develop and administer a new E-filer Baseline Survey, with the purpose of assessing, among other things, ECF filing attorneys' views on the level of e-discovery involved in their cases, their own experience with and general knowledge about e-discovery issues, the proportionality of costs incurred as a result of e-discovery issues and the level of cooperation experienced with opposing counsel on such issues. In August 2010, the initial E-filer Baseline Survey was sent to over twenty-five thousand (25,000) attorneys who were e-filers in at least one of the seven (7) districts in the Seventh Circuit and was completed by over six thousand (6,000) of those attorneys. Eighteen (18) months later, in March 2012, the same E-filer Baseline Survey was repeated, with an added series of questions focused on attorneys' awareness of the Pilot Program and of the educational opportunities and resources provided by the Program. The March 2012 E-filer Baseline Survey was again sent to over twenty-five thousand (25,000) attorneys who were e-filers in at least one of the seven (7) districts in the Seventh Circuit and was completed by over six thousand five hundred (6,500) attorneys, for a response rate of twenty-six percent (26%).

Additionally, in March 2012, the Survey Subcommittee, with critical support from the FJC, reviewed and refined the Phase One Survey in order to develop a Phase Two Survey. During this process, the Subcommittee reviewed every question on both the Phase One Attorney Survey and the Phase One Judge Survey. The goal of the Phase Two Survey, as with Phase One, was to assess the

effectiveness of the Principles and Phase Two of the Pilot Program by gathering opinion data through a self-report questionnaire to obtain perceptions of the procedures from the participants in the Program and assess satisfaction with the Principles and processes surrounding the Principles. Upon review by the Subcommittee, the vast majority of the original Phase One survey questions were left intact in both the attorneys' and judges' questionnaires in order to allow for potential comparison to the Phase One 2010 Survey results, in addition to independently serving as an evaluative and information-gathering tool to assess effectiveness of the Program during Phase Two.

As noted in the May 2010 Phase One Report, the Subcommittee worked closely with Corina Gerety of IAALS to develop the original Phase One Survey questionnaires, including extensive group drafting sessions of the questionnaires, which began with the drafting of hypotheses based on the Principles themselves. The FJC Research Division also provided invaluable guidance and recommendations during the development of the original Survey questionnaires. Before completion, the Survey Subcommittee's original Phase One questionnaires were distributed to the full Committee, which met to discuss recommended changes for improving, and in some cases expanding, the Survey questionnaires to include additional perspectives. As a part of the work in Phase One, the Survey Subcommittee ultimately designed two survey questionnaires for Pilot Program participants — the Phase One Judge Survey and the Phase One Attorney Survey; the same approach was maintained for Phase Two.

Further, once again, given that the majority of the participating judges had numerous cases in the Pilot Program, the Phase Two Survey asked each of the judges to complete one Survey questionnaire covering all of their cases in the Program, with the narrative portion of the Survey questionnaire providing judges an opportunity to provide information on specific cases or types of cases, where appropriate. In contrast, the vast majority of attorneys with cases in the Pilot Program had only one case in the Pilot Program, and thus were asked to fill out a separate Survey questionnaire based on the application of the Principles for each specific case in the Pilot Program. The Subcommittee again opted in Phase Two not to send a survey questionnaire directly to parties to the lawsuits in the Pilot Program based on a number of considerations, including overlap with the Attorney Survey Questionnaire and continued administrative barriers to collecting such information. The final Phase Two Judge Survey E-mail and Questionnaires is attached to this Report as Appendix E.2.a. and the final Phase Two Attorney Survey E-mail and Questionnaires is attached to this Report as Appendix E.2.b.

Emery G. Lee III, Jason A. Cantone, and Margaret S. Williams of the FJC led the digitization and the on-line electronic administration of the Phase Two Survey, which began on February 13, 2012, and was completed by March 7, 2012. The Phase Two Judge Survey was sent to forty (40) judges; twenty-seven (27) replied, for a response rate of sixty-eight percent (68%). The Phase Two

Attorney Survey was sent to seven hundred eighty-seven (787) attorneys designated as lead counsel in cases identified as Phase Two Pilot Program cases; the Survey instructions requested that only one counsel per party respond for each case, and, accordingly, that either the lead attorney or the lawyer on the team with the most knowledge of the e-discovery in the case complete the Survey. Two hundred thirty-four (234) attorneys replied, for a response rate of thirty percent (30%).

The completed Phase Two questionnaires were reviewed by the FJC only for processing and analysis. Identifying information included in response to the Survey was maintained strictly confidential by the FJC Survey administrators. Neither the court, the Seventh Circuit Electronic Discovery Pilot Program Committee, nor any other judges or attorneys had access to any identifying information.

8. PHASE TWO SURVEY RESPONSES AND RESULTS

Phase Two included a total of two hundred ninety-six (296) cases selected by the participating U.S. District Judges and U.S. Magistrate Judges from among the cases on their respective dockets as explained in Section 7. In February and March 2012, surveys were sent to the participating judges (the "Judge Survey") and attorneys (the "Attorney Survey"). In March 2012, surveys were sent to each of attorneys who registered as e-filers in at least one of the seven (7) districts in the Seventh Circuit (the "E-filer Baseline Survey"). Selected results from those surveys are discussed, summarized, and reported below. The Federal Judicial Center's reports summarizing the results of (a) the Judge Survey and Attorney Surveys and (b) the E-filer Baseline Survey are attached as Appendices F.2.a. and F.2.b. to this Report. The FJC's reports also provide the detailed survey results, including the survey totals by question and all of the narrative comments submitted by the attorneys and judges in response to the surveys.

A. Judge Survey

(1.) Number and Percentage of Participation

Forty (40) federal judges, including seventeen (17) district judges, twenty-one (21) magistrate judges, and two (2) bankruptcy judges, participated in Phase Two of the Pilot Program by implementing the Principles through orders entered in each Phase Two Case. On average, each judge used the Principles in approximately 7.2 cases.

A total of twenty-seven (27) of the participating judges (sixty-eight percent (68%)) responded to the Phase Two Judge Survey Questionnaire. Each judge was asked to consider all of the Phase Two cases over which they individually presided in answering the questionnaire. Despite this healthy response rate, the survey responses should be treated as anecdotal expressions of opinion from expert observers, and some caution should be taken before extrapolating the participating judges' responses to the larger population of judges in the Seventh Circuit and the country overall.

(2.) Summary of Results

Overall, the Phase Two Judge Survey results reflect continued strong support for the Program and the Principles. For example, three-quarters of all of the responding judges reported that the Principles increased or greatly increased the fairness of the e-discovery process. And not a single judge reported that the Principles decreased fairness. (Table J-16.) And as was the case in Phase One, most of the responding judges — sixty-three percent (63%) — indicated that the proportionality

Principles set out in Federal Rule of Civil Procedure 26(b)(2)(C), and emphasized in Principle 1.03, played a significant role in the development of discovery plans in their pilot cases. (Table J-4.)[3]

Responding judges provided a positive picture of their familiarity with the Principles. Seventy-seven percent (77%) of the judge respondents rated themselves as a 4 or 5 ("Very familiar") on a 0-5 scale. No judge rated herself as "Not at all familiar." (Table J-2.) In addition, the judge respondents tended to rate the parties' discussions of e-discovery issues prior to the Rule 16(b) conference as comprehensive, with seventy-eight percent (78%) rating the discussions in the upper half of the 0-5 scale (5 being "Comprehensive Discussion"). (Table J-3.)

The results of the survey also provide clear confirmation of the judges' favorable view of the e-discovery liaison. Fully sixty-three percent (63%) of judge respondents agreed or strongly agreed with the statement that "The involvement of e-discovery liaison(s) has contributed to a more efficient discovery process," and no judge respondent disagreed or strongly disagreed with that statement. (Table J-21.) And sixty-eight percent (68%) of judge respondents reported that the Principles work better in some cases than in others. (Table J-22.)

The results of the survey also provide other evidence of the continuing positive effect the Principles are having on discovery in the federal courts. For example, of the twenty-seven (27) responding judges,[4]

- Eighty-four percent (84%) reported that application of the Principles had increased or greatly increased counsel's familiarity with their clients' data and systems. (Table J-19.)

- Seventy-eight percent (78%) reported that the Principles had increased or greatly increased levels of cooperation exhibited by counsel to efficiently resolve their cases. (Table J-5.)

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[3] Interestingly, responding attorneys had a different perception; only nineteen percent (19%) indicated that proportionality Principles played a significant role. Fifty-eight percent (58%) of those responding stated that they did not play a significant role, and an additional twenty-three percent (23%) stated that there was no discovery plan in the case.

[4] The Phase One Judge Survey results were similar. In most cases, however, the majorities/pluralities were higher in Phase One than Phase Two. For example, ninety-one percent (91%) of Phase One responding judges reported that the Principles had the effect of increasing or greatly increasing counsel's demonstrated familiarity with their clients' electronic data and data systems. The reason for the variation is not clear. It is worth noting, however, the small number of judges in the two surveys and the significant increase in the number of judges from Phase One to Two (thirteen (13) judges to twenty-seven (27)). For a survey with only thirteen (13) respondents, such as Phase One, the difference between ninety-one percent (91%) and eighty-four percent (84%) would be less than one judge.

- Seventy-eight percent (78%) reported that the Principles had increased or greatly increased the likelihood of an agreement between counsel under Federal Rule of Evidence 502. (Table J-6.)

- Seventy-one percent (71%) indicated that the Principles had increased or greatly increased the attorneys' demonstrated level of attention to the technologies affecting the discovery process. (Table J-17.)

- Seventy percent (70%) reported that the Principles had increased or greatly increased their own understanding of the parties' data and systems. (Table J-20.)

- Sixty-seven percent (67%) reported that the Principles had increased or greatly increased the extent to which counsel meaningfully attempt to resolve discovery disputes before seeking court intervention. The remaining judges reported that the Principles had no effect; no judge reported a decrease. (Table J-7.)

- Sixty-six percent (66%) indicated that the Principles had increased or greatly increased the parties' ability to obtain relevant documents. The remaining judges reported that the Principles had no effect; no judge reported a decrease in the parties' ability to obtain relevant documents as a result of the application of the Principles. (Table J-9.)

- Fifty-nine percent (59%) stated that the Principles had increased or greatly increased their own level of attention to the technologies affecting the discovery process. (Table J-18.)

- Fifty-two percent (52%) indicated that the Principles had increased or greatly increased the promptness with which unresolved discovery disputes are brought to the court's attention. The remaining judges reported that the Principles had no effect; no judge reported a decrease in how promptly such disputes were brought to the court's attention. (Table J-8.)

- Forty-eight percent (48%) reported that the Principles had decreased or greatly decreased the number of discovery disputes brought before the court, as opposed to only eight percent (8%) reporting that they increased such disputes. (Table J-13.)

The vast majority of the responding judges also reported that the Principles reduced (forty-one percent (41%)), or had no effect on (forty-eight percent (48%)), the number of allegations of spoliation or sanctionable conduct in cases. Only eleven percent (11%) reported that the effect of the Principles was to increase the number of such allegations. (Table J-10.) Finally, the responding judges confirmed that the Principles either reduced (thirty-seven percent (37%)), or had no effect on

(forty-four percent (44%)), the number of requests for discovery on another party's efforts to preserve or collect ESI. Only nineteen percent (19%) reported that the Principles increased the number of requests for discovery of preservation or collection of ESI. (Table J-14.)

B. Attorney Survey

(1.) Number and Percentage of Participation

Two hundred thirty-four (234) of the seven hundred eighty-seven (787) attorneys designated as lead counsel in the Pilot Program cases responded to the Phase Two Attorney Survey Questionnaire. This constitutes a response rate of thirty percent (30%). Each attorney was asked to respond with regard to his or her experience in connection with the single Phase One case in which he or she served as counsel of record. The most commonly reported role with respect to ESI was representing a party that was primarily a producing party (thirty-eight percent (38%)), followed by representing a party equally a requesting and producing party (twenty-seven percent (27%)), representing a party that was primarily requesting ESI (twenty-five percent (25%)), and representing a party that was neither a requester nor a producer (ten percent (10%)). (Table A-5.) This relative imbalance makes sense, given that sixty-three percent (63%) of the attorney respondents reported having represented a defendant in their Pilot case. This is in contrast to the Phase One survey, in which the respondents were split evenly between plaintiff and defendant attorneys. (Table A-1.)

The mean number of years in practice for responding attorneys was 21 years. The most common practice area was commercial litigation — not primarily class action. The median attorney reported 6-10 e-discovery cases in the past 5 years, not including Pilot cases. Fully thirty-seven percent (37%) of attorneys rated their own familiarity with the Principles at 4 or 5 ("Very familiar") on a 0-5 scale; the median attorney rated herself at 3 on the 0-5 scale. The most common type of client for the attorney respondents was a privately held company (forty-three percent (43%)). (Table A-1.)

The Phase Two cases were at various stages in the litigation process when they were selected for inclusion in the Pilot Program. As a result, some of the questions posed in the Phase Two Attorney Survey Questionnaire were not applicable to all cases. The attorneys' responses provide a snapshot of information. As with the Phase Two Judge Survey Questionnaire, however, caution should be exercised in extrapolating the attorneys' responses to a larger population.

(2.) Summary of Results

The Phase Two Attorney Survey results generally reflect that the Principles are having a positive effect. Forty percent (40%) of attorney respondents reported that the application of the Principles

in their Pilot cases had increased or greatly increased the fairness of the e-discovery process, as compared to only five per cent (5%) who indicated that the Principles decreased or greatly decreased fairness. (Table A-23.) Thirty-six percent (36%) of responding attorneys reported that the Principles had increased or greatly increased the level of cooperation exhibited by counsel, as compared to only two percent (2%) reporting that the Principles decreased or greatly decreased cooperation. (Table A-20.) Thirty-five percent (35%) reported that the Principles had increased or greatly increased the parties' ability to resolve e-discovery disputes without court involvement, as compared to only four percent (4%) who indicated that the Principles decreased or decreased the parties' ability to resolve such disputes. (Table A-22.) Twenty-eight percent (28%) of attorney respondents reported that the Principles increased or greatly increased their ability to obtain relevant documents, as compared to only two percent (2%) who reported that they decreased or greatly decreased that ability. (Table A-24.) And ninety-seven percent (97%) of attorney respondents reported that the Principles increased, or had no effect on, their ability to zealously represent their clients, as opposed to three percent (3%) who reported a decrease. (Table A-21.)[5]

Responding attorneys also generally reported that the Principles were helpful in facilitating understanding of and discussions about e-discovery issues. Forty-nine percent (49%) of attorney respondents reported discussing the preservation of ESI with opposing counsel at the outset of the case, almost double the number of attorneys who reported not having such discussions (twenty-nine percent (29%)). The number of respondents having discussions and not having discussions were each slightly higher in Phase One. (Table A-7.) Sixty-three percent (63%) reported that, prior to meeting with opposing counsel, they became familiar with their client's electronic data and systems, essentially the same result as in Phase One. (Table A-8.) Forty-six percent (46%) of responding attorneys reported that, at or soon after the Rule 26(f) meeting, the parties discussed potential methods for identifying ESI for production, as opposed to only thirty percent (30%) who did not. The number of attorneys having such discussions was slightly higher, and the number not having discussions slightly lower, in Phase One. (Table A-9.)

Forty-one percent (41%) of attorney respondents reported that they met with opposing counsel prior to the Rule 16(b) conference to discuss the discovery process and ESI, as compared to thirty-five percent (35%) of attorneys who did not. (Table A-10.) Ten percent (10%) of respondents reported that unresolved e-discovery disputes were presented to the court at the Rule 16(b) conference, while forty-five percent did not. (Table A-11.) Twenty-nine percent (29%) of respondents reported that e-discovery disputes arising after that conference were raised promptly with the court, as opposed to seventeen percent (17%) who reported they were not. (Table A-12.) The most commonly reported e-discovery topics discussed by counsel prior to beginning discovery

[5] These numbers are very similar to the results for these same questions in Phase One.

were reported as the scope of relevant and discoverable ESI (fifty-six percent (56%)), the scope of ESI to be preserved by the parties (forty-six percent (46%)), and formats of production for ESI (thirty-nine percent (39%)). (Table A-13.)

The attorney respondents also reported on the scope and volume of electronic data involved in their cases, as well as who pays for the production cost. Forty-one percent (41%) of respondents reported less than one quarter of the information exchanged was in electronic format; twenty-nine percent (29%) reported more than three (3) quarters. (Table A-3.) In terms of more complex cases, forty-one percent (41%) of respondents reported high volume data of 100-500 gigabytes and up to twenty-five (25) custodians, twenty-two percent (22%) reported segregated data, twenty-two percent (22%) listed structured data, and nineteen percent (19%) legacy data. (Table A-6.) Interestingly, no attorney respondent in Phase Two reported foreign data. Only twenty-three (23%) of attorney respondents reported that any requesting party in their Pilot case would bear a material portion of the production costs of ESI. (Table A-4.)

The e-discovery liaison provisions in the Principles were particularly well received. Attorney respondents who reported that the e-discovery liaison was applicable in their case tended to agree overwhelmingly with the statement that "The involvement of my client's e-discovery liaison has contributed to a more efficient discovery process," with forty-seven percent (47%) agreeing or strongly agreeing and only three percent (3%) disagreeing. These numbers were similar to the Phase One results. (Table A-33.) Out of the same group of responding attorneys for whom the e-discovery liaison was applicable, most also agreed that "The involvement of the e-discovery liaison for the other party/parties has contributed to a more efficient e-discovery process," with twenty-nine percent (29%) agreeing or strongly agreeing, as compared to only seven percent (7%) disagreeing or disagreeing strongly. In Phase One, slightly fewer attorneys agreed with this statement, and slightly more disagreed. (Table A-34.) The most commonly reported type of e-discovery liaison was an employee of the party — thirty-three percent (33%) — although thirty-six percent (36%) of those responding reported that no e-discovery liaison was designated in the Pilot case.

Separate and apart from the Principles, a substantial majority of responding attorneys reported cooperation among opposing counsel as being excellent or adequate. *See* Tables A-15-19. Cooperation in facilitating the understanding of ESI in the case was rated by fifty-seven percent (57%) of responding attorneys as excellent or adequate — including forty-three percent (43%) adequate and fourteen percent (14%) excellent — as opposed to seventeen percent (17%) who reported it as poor. (Table A-15.) The numbers for other questions on cooperation in other respects were similar:

- Cooperation in facilitating understanding of the data systems involved: ten percent (10%) excellent, forty-two percent (42%) adequate, and fourteen percent (14%) poor (Table A-16);

- Cooperation in formulating a discovery plan: seventeen percent (17%) excellent, forty-two percent (42%) adequate, and fifteen percent (15%) poor (Table A-17);

- Cooperation in reasonably limiting discovery requests and responses: thirteen percent (13%) excellent, thirty-eight percent (38%) adequate, and twenty-three percent (23%) poor (Table A-18);

- Cooperation in ensuring proportional e-discovery: eleven percent (11%) excellent, thirty-three percent (33%) adequate, and twenty percent (20%) poor (Table A-19.)

When asked how application of the Principles has affected the level of cooperation exhibited by counsel to efficiently resolve the case, all but two percent (2%) of attorney respondents reported that the Principles either had no effect or increased or greatly increased the level of cooperation. (Table A-20.)

Seventy-three percent (73%) of responding attorneys reported that the Principles decreased, greatly decreased, or had no effect on discovery costs, with most of those respondents reporting that the Principles had no effect on those costs. Only twenty-seven percent (27%) reported that the Principles had increased or greatly increased discovery costs. (Table A-27.) Seventy-five percent (75%) of respondents reported that the Principles decreased, greatly decreased, or had no effect on total litigation costs. Once again, most attorneys responded "no effect" to that question. In contrast, only twenty-six percent (26%) (with adjustments for rounding) reported that the Principles had increased or greatly increased those costs. (Table A-28.) Similarly, attorneys reported that seventy-seven percent (77%) of respondents reported that the Principles decreased, greatly decreased, or had no effect on the number of discovery disputes (with most of those being "no effect"), as compared to twenty-four percent (24%) reporting an increase or great increase. (Table A-31.)

C. E-filer Baseline Survey

The Phase Two E-filer Baseline Survey was sent to 25,894 attorneys who were registered as e-filers in at least one of the seven (7) districts in the Seventh Circuit. A total of 6,631 attorneys replied, for a response rate of twenty-six percent (26%). The 6,631 Phase Two attorney respondents represent the full range of practice types, with the largest blocs coming from private firms with 2-10

attorneys (thirty percent (30%)) and 11-25 attorneys (fourteen (14%)). (Table E-1.)[6] The type of case the Phase Two attorneys usually litigate varies widely, and includes employment discrimination cases (twenty-two percent (22%)), contracts cases (twenty-one percent (21%)), civil rights cases (twenty percent (20%)), and complex commercial transactions cases (twenty percent (20%)). (Table E-2.) Forty-three percent (43%) primarily represent defendants, thirty percent (30%) primarily represent plaintiffs, and twenty-seven percent (27%) represent both equally. (Table E-3.) The Phase Two respondents were slightly more likely to represent plaintiffs and slightly less likely to represent defendants than their Phase One counterparts. (Table E-4.) Twenty-two percent (22%) of Phase Two respondents reported that their cases always involve the discovery of electronically stored information and documents, an increase from the seventeen percent (17%) of Phase One respondents. (Tables E-9 and E-10.)

The E-filer Baseline Survey results also show that the Principles, and the increased focus on cooperation, are having the desired effect. Seventy-seven percent (77%) of respondents in both Phase One and Phase Two rated opposing counsel as cooperative or very cooperative, and only five percent (5%) of respondents in Phase One and Phase Two rated opposing counsel as very uncooperative. (Tables E-5 and E-6.) Ninety-five percent (95%) of respondents in both Phase One and Phase Two rated their own level of cooperation in the discovery process as cooperative or very cooperative. (Tables E-7 and E-8.)

Phase Two respondents were more likely to find opposing counsel to be knowledgeable of and experienced with the discovery of electronically stored information and documents, with sixty-six percent (66%) of Phase Two respondents reporting that opposing counsel was very knowledgeable or knowledgeable, an increase from sixty-one percent (61%) of Phase One respondents. (Tables E-11 and E-12.)

Phase Two respondents were slightly more likely to rate themselves as knowledgeable of and experienced with the discovery of electronically stored information and documents. But the difference between Phase One and Two was much smaller here than with respondents' ratings of opposing counsel, perhaps because respondents typically tend to rate their own knowledge rather highly. Seventy-six percent (76%) of Phase Two respondents reported themselves as very knowledgeable or knowledgeable, as compared to seventy-three percent (73%) of Phase One respondents. (Tables E-13 and E-14.)

Respondents' position on the level of proportionality of costs, resources required, and ease of identification and production of ESI for requests for production remained consistent between Phase

[6] The Phase Two E-filer Baseline Survey Data Results are attached as Appendix F.2.b.

One and Two. For requests received, respondents in both phases were split almost evenly between finding that requests were disproportionate (forty nine percent (49%)) or proportionate (fifty-one percent (51%)). (Tables E-15 and E-16.) Not surprisingly, respondents were more likely to see their own requests as proportionate. For requests served, in both phases about one-third of respondents found them disproportionate and two-thirds found them proportionate. (Tables E-17 and E-18.)

Respondents in Phase Two rated themselves as more knowledgeable of and experienced with the Principles, with thirty percent (30%) of Phase Two respondents rating themselves as very knowledgeable or knowledgeable, as compared to twenty-six percent (26%) of Phase One respondents. Parts of Wisconsin and Indiana, in particular, showed an improvement in knowledge and experience between Phase One and Phase Two. In the Northern District of Indiana, during Phase One, twenty percent (20%) reported themselves as knowledgeable or very knowledgeable, as compared to eighty percent (80%) not knowledgeable or very unknowledgeable. In Phase Two, the knowledgeable numbers climbed to twenty-five percent (25%) and the not knowledgeable numbers dropped to seventy-five percent (75%). Similarly, in the Eastern District of Wisconsin, knowledgeable numbers increased from eighteen percent (18%) to twenty-five percent (25%), and not knowledgeable numbers fell from eighty-two percent (82%) to seventy-five percent (75%). The Western District of Wisconsin experienced the most dramatic change: knowledgeable numbers went from fifteen percent (15%) in Phase One to twenty-seven percent (27%) in Phase Two, and not knowledgeable numbers fell from eighty-six percent (86%) in Phase One to seventy-three percent in Phase Two (73%). (Tables E-19 and E-20.)

The Phase Two E-filer Baseline Survey also included six (6) new questions to gauge respondents' knowledge of the Pilot Program and its web site, webinars, resources, and educational programs. Thirty-five percent (35%) of respondents were aware of the Pilot Program's web site (Table E-21) and eighteen percent (18%) reported that they had visited that web site (Table E-22.) Thirty percent (30%) of respondents were aware that the Program has sponsored a series of webinars and that copies are available on the web site (Table E-23); thirteen percent (13%) reported that they had viewed or listened to a Program webinar. (Table E-24.) Seven percent (7%) of respondents reported that they had used he case law and other resources available on the Program's web site. (Table E-25.) Eleven percent (11%) of respondents reported that they had participated in an educational program offered by the Program. (Table E-26.)

Almost all of these numbers were highest in the Northern District of Illinois, where thirty-nine percent (39%) of responding attorneys reported being aware of the Program's web site, www.DiscoveryPilot.com; twenty-two percent (22%) report having visited the web site; thirty-four percent (34%) state that they are aware of the webinars on the web site; fifteen percent (15%) report having viewed or listed to a Program webinar; eight percent (8%) report having used the case law

lists or the other resources on the web site; and thirteen percent (13%) having used the educational programs on the site. (Tables E-21 — E-26.)

The E-filer Baseline Survey results show that the Committee's significant outreach efforts have had an effect. A significant and growing number of attorneys report having knowledge of and experience with the Principles. A smaller, but also significant, number of attorneys have used and benefitted from the Pilot Program's web site, webinars, educational programs, and other resources. But despite this interest, there is more work to be done. The Committee in Phase Three will redouble its efforts at outreach and education, with the goal of ensuring fairness in, and reducing the costs of, electronic discovery.

9. ASSESSMENT OF PILOT PROGRAM PRINCIPLES FOR PHASES ONE AND TWO

Section 8 of this Report summarizes the results of Phase Two in a global "snapshot." This Section, in contrast, matches the Phase Two Survey results with particular Principles being tested. As explained in Section 8, caution should be exercised in extrapolating the results of the Survey to a larger population of attorneys or judges. Because of the limited duration of Phase Two, the participating cases were captured at various states of litigation. Consequently, many attorneys and judges felt it was too early to draw conclusions. Indeed, a majority of the responding attorneys reported that the Principles had a neutral effect on discovery costs, length of discovery, and the number of discovery disputes. (App. F.1.b. at 41-44.) However, as explained in detail below, the attorneys who did report an impact on their cases generally felt that the Principles were having a positive effect on a wide range of ESI discovery issues.

A. Principle 1.01 (Purpose)

> *The purpose of these Principles is to assist courts in the administration of Federal Rule of Civil Procedure 1, to secure the just, speedy, and inexpensive determination of every civil case, and to promote, whenever possible, the early resolution of disputes regarding the discovery of electronically stored information ("ESI") without Court intervention. Understanding of the feasibility, reasonableness, costs, and benefits of various aspects of electronic discovery will inevitably evolve as judges, attorneys and parties to litigation gain more experience with ESI and as technology advances.*

(1.) Committee's Reasoning for Principle 1.01

Principle 1.01 explains the intended purpose of the Principles. The Committee felt that practitioners too often overlook Rule 1 of the Federal Rules of Civil Procedure and, in particular, the stated purpose for the rules of securing the "just, speedy, and inexpensive" determination of cases. Litigants may be rightly frustrated when a just determination is reached but only after inordinate delay and excessive expense. Accordingly, the Committee took the opportunity in Principle 1.01 to remind practitioners of the stated purpose of the Rules.

The Committee also felt it important to observe that many disputes regarding ESI, and spoliation in particular, are caused or exacerbated by parties' reluctance to discuss potentially controversial issues at the outset. The Committee felt that early discussion was more likely to lead to amicable

resolution of most issues and, where amicable resolution is not possible, to fewer complex and contentious issues being presented to the courts. Often parties or counsel hope the issue will be mooted by the passage of time. Perhaps the discovery issues will be avoided by a successful motion to dismiss or settlement or will simply never percolate to the surface. However, it is the nature of ESI that the passage of time tends to make issues more difficult to resolve. If issues regarding preservation are not promptly addressed with the opposing party and any remaining disputes presented to the court, then it is often the case that the disputed ESI will be lost. As a result, the delayed identification of these disputes is more likely to require court intervention and often quickly escalates into a spoliation issue. Similarly, issues concerning whether to search and produce certain sources of ESI also tend not to improve with age. Indeed, many ESI sanctions cases have involved preserved, but belatedly identified, sources of ESI. Accordingly, a key purpose of the Principles, stated expressly in Principle 1.01, is to encourage the early discussion and resolution of disputes concerning discovery of ESI.

Finally, Principle 1.01 notes that discovery of ESI is an emerging area. Litigants and courts still have much to learn. The Principles are not meant to anticipate or solve every issue. Hopefully they do provide a useful framework for identifying and resolving discovery issues in a just, speedy, and inexpensive fashion.

(2.) Phase One Survey Results on Principle 1.01

The Survey responses do not suggest any controversy over the aspirational statements set forth in Principle 1.01. The Survey responses frequently identified the most useful aspects of the Principles as the encouragement of early focus on electronic discovery issues and the focus on proportionality. A representative respondent stated that the most useful aspect of the Principles is that it "forces the part[ies] to discuss e-discovery at the beginning of the case." (App. F.1.b. at 51.) Another respondent reported that "[m]erely focusing the parties' and the Court's attention on these issues has been helpful in moving the case forward more efficiently and saving my client money." (*Id.*) Given the brief length of Phase One of the Pilot Program and the various stages of litigation at which many of the cases were selected to participate many felt it was too early to draw conclusions, which is understandable. Of those attorney respondents who felt there was or likely would be an impact on their cases, the vast majority thought the Principles were having a positive effect on a wide range of ESI fronts, including levels of cooperation, ability to zealously represent clients, fairness, amicable resolution of issues, ability to get needed discovery, and the ability to get information about their opponents' efforts to preserve and collect ESI. (*Id.* at 35-40.) The goals stated in Principle 1.01 appear to be well received.

While the Committee hoped the Principles ultimately would lead to better cooperation and less discovery motion practice, the Committee suspected that the Principles initially might increase the number of disputes by forcing parties to more proactively confront potentially contentious issues. Most attorney respondents, over seventy percent (70%), felt that the Principles had no effect on the incidence of allegations of spoliation and other sanctionable conduct. (*Id.* at 39.) However, of those attorneys who thought the Principles were having an effect, more felt that the Principles increased (or were likely to increase) such allegations than felt the Principles decreased (or were likely to decrease) such allegations. (*Id.*) The judges overwhelmingly (eighty-five percent (85%)) felt that the Principles were reducing discovery disputes brought before the court. (App. F.1.a. at 16.) Whether the Principles ultimately will reduce the incidence of discovery disputes, in particular sanctions disputes, after Phase One remains to be determined. Also, any reduction in the number of disputes coming before the courts will only be a positive change if the parties are cooperating and constructively resolving discovery issues, and not if the reduction occurs because the parties are being discouraged from seeking relief when needed.

(3.) Committee's Phase One Recommendation on Principle 1.01

Principle 1.01 appears to be well received and no significant revisions appear to be necessary at this time. In Phase Two of the Pilot Program, the Committee should continue testing whether the Principles actually lead to the just, speedy, and inexpensive determination of cases.

(4.) Phase Two Survey Results on Principle 1.01

The Phase Two Survey ("Survey Two") results align closely with those from Phase One ("Survey One"), and continue to suggest no controversy over the aspirational statements set forth in Principle 1.01.[7] While the Committee's cautionary statement that the application of the Principles might initially result in an increase in the number of discovery disputes appears to have been borne out (Table A-31), it is notable that after only the second full year of the Pilot Program, fully forty percent (40%) of attorney respondents reported that the application of the Principles in their Pilot cases had increased or greatly increased the fairness of the e-discovery process (Table A-23), while only five percent (5%) believed fairness was diminished. The gains in fairness have come with the apparent

[7] It should be kept in mind that sixty-two percent (62%) of Survey Two attorney respondents reported having represented a defendant in their Pilot case, compared with Survey One's nearly even split between plaintiff and defendant representation.

trade-off of an increase in discovery and total litigation costs, at least in the opinion of the bar as opposed to the bench. (Tables A-27, A-28.)[8]

Survey Two attorney respondents frequently identified the most useful aspects of the Principles as the encouragement of early focus on electronic discovery issues, and focus on proportionality. Notwithstanding a de minimis downward drift between Survey One and Survey Two, the overall response was positive. One attorney respondent noted that the court's serious attitude toward the Program "coupled with the clarity of the Program — has led to increased professionalism and significantly decreased costs." Another attorney respondent reported that "[t]he requirement to meet and confer early regarding ESI early on in litigation is most beneficial for purposes of avoiding discovery disputes down the road." A third attorney respondent reported that the Principles "[p]rovided a clearer framework for the parties to deal with e-Discovery issues."

Fully seventy-five percent (75%) of judge respondents reported that the Principles had increased or greatly increased the fairness of the e-discovery process (Table J-16), while forty-eight percent (48%) of judge respondents reported that the application of the Principles to their cases during the Survey Two period decreased or greatly decreased the number of discovery disputes before the court (eight percent (8%) reported an increase, zero percent (0%) greatly). (Table J-13.) This reported increase in discovery disputes may reflect the application of the Principles to an increasing number of cases within the Seventh Circuit. One judge respondent reported that the standards embodied in the Principles "provide a uniform and default set of Principles that need not be reinvented for each case, so that improves case management efficiency." Another judge respondent reported the Principles "in general…prompt[s] the parties to discuss e-discovery issues, if applicable, in advance of the Rule 16(b) conference. A third judge respondent suggested that the Principles could be improved by having a "third stage that addresses the admissibility of electronic evidence."

(5.) Committee's Phase Two Recommendation as to Principle1.01

Principle 1.01 continues to be well received and no significant revisions appear to be necessary at this time. It should be subjected to continued testing and analysis in Phase 3.

B. Principle 1.02 (Cooperation)

> *An attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties*

[8] It should be noted that the Survey data do not currently provide reasons why these costs increased (i.e., type of matter litigated, discovery dispute vs. discovery processing as sources of litigation costs).

to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

(1.) Committee's Reasoning for Principle 1.02

The Committee believes that the culture of our adversarial system tends to result in overly combative discovery that is often counterproductive to the stated purpose of the Federal Rules of Civil Procedure: securing the "just, speedy, and inexpensive" determination of cases. Fed. R. Civ. P. 1. Principle 1.02 echoes The Sedona Conference® Cooperation Proclamation, a proclamation adopted by numerous judges that calls for intelligent cooperation among counsel on discovery. Lawyers are advocates and take justifiable pride in zealously representing their clients. But "[a]s officers of the court, attorneys share this responsibility [to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay] with the judge to whom the case is assigned." Fed. R. Civ. P. 1, Advisory Committee Notes. Lawyers are officers of the court and should not use discovery as a weapon in ways that undermine resolving cases timely, efficiently, and on their merits.

(2.) Phase One Survey Results on Principle 1.02

The survey responses do not suggest any controversy over Principle 1.02's call for cooperation. In fact, many survey responses identified the call for cooperation as the most useful aspect of the Principles. In one attorney's assessment, the Principles are useful in "[p]romoting cooperation and understanding before disputes arise and when egos have flared." (App. F.1.b. at 51.) Of those respondents who felt the Principles affected or likely would affect their cases, the majority of responding attorneys thought the Principles were having a positive effect on the level of cooperation between counsel and on the attorney's ability to zealously represent his or her client. (*Id.* at 35-36.) The judge respondents agreed on both points. (App. F.1.a. at 11, 17.) This tends to confirm that there is not a conflict between these two concepts.

(3.) Committee's Phase One Recommendation on Principle 1.02

Principle 1.02 appears to be well received and no significant revisions appear to be necessary at this time. It should be subjected to continued testing in Phase Two of the Pilot Program.

(4.) Phase Two Survey Results on Principle 1.02

Survey Two results follow in line with Survey One and do not suggest any controversy over Principle 1.02's call for cooperation. Indeed, Survey Two results indicate that the introduction of Principle 1.02's mandate for cooperation in the discovery process has provided substantive and

substantial momentum in achieving the aspirational objectives set forth in Principle 1.01. Fully forty-percent (40%) of attorney respondents reported that the application of the Principles in their Pilot cases had increased or greatly increased the fairness of the e-discovery process (Table A-23), thirty-six percent (36%) reported that the Principles had increased or greatly increased the level of cooperation exhibited by counsel (Table A-20), and thirty-five percent (35%) reported that the Principles had increased or greatly increased the parties' ability to resolve e-discovery disputes without court involvement. (Table A-22.) Of responding attorneys, seventy-one percent (71%) reported that the application of the Principles had no affect with respect to their ability to zealously represent clients (Table A-21), while thirty-six percent (36%) reported that the Principles had increased or greatly increased the level of cooperation exhibited by counsel. (Table A-20.) Fully forty-nine percent (49%) of attorney respondents reported meeting with opposing counsel at the case's outset to discuss preservation of ESI (Table A-7), sixty-three percent (63%) reported that prior to meeting with opposing counsel, they became familiar with their client's electronic data and systems (Table A-8), and forty-six (46%) reported that, at or soon after the Rule 26(f) meeting, the parties discussed potential methods for identifying ESI for production. (Table A-9.) Fully forty-one percent (41%) of attorney respondents reported that they met with opposing counsel prior to the Rule 16(b) conference to discuss the discovery process and ESI. (Table E-10.) Only ten percent (10%) of attorney respondents reported that unresolved e-discovery disputes were presented to the court at the Rule 16(b) conference (Table A-11), while twenty-nine percent (29%) reported that e-discovery disputes arising later in the Pilot case were raised promptly with the court. (Table A-12.) Many attorney respondents reported with positive comments about their experiences with the Principles. One attorney respondent noted "[t]he parties have been relying strongly on the written Principles of the Pilot Program, which has facilitated cooperation and resolution when disputes arise." Another attorney respondent commented that the Principles '[r]equired cooperation of counsel to streamline process and identify responsive documents (separating wheat from the chaff) early on."

Judge respondents' experiences were similarly positive, with fully seventy-eight percent (78%) of responding judges reporting that the Principles had increased or greatly increased levels of cooperation exhibited by counsel to efficiently resolve their cases (Table J-5), while twenty-six percent (26%) of judge respondents reported that, based on filed materials and in-court interactions, application of the Principles to Pilot Program cases, increased counsel's ability to zealously represent the litigants. (Table J-15.) Further, sixty-seven percent (67%) of judge respondents reported that the Principles had increased or greatly increased the extent to which counsel meaningfully attempted to resolve discovery disputes before seeking court intervention. (Table J-7.) One judge respondent reporting on the utility of the Principles stated that they resulted in "[i]ncreasing awareness of the need to cooperate and work on protocols to anticipate problems and develop mechanisms for avoiding them altogether or resolving them."

(5.) Committee's Phase Two Recommendation as to Principle 1.02

Principle 1.02 continues to be well received and no significant revisions appear to be necessary at this time. It should be subjected to continued testing, analysis and evaluation in Phase 3.

C. Principle 1.03 (Discovery Proportionality)

> *The proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C) should be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable.*

(1.) Committee's Reasoning for Principle 1.03

The proportionality Principle set forth in Rule 26(b)(2)(C) is vital to achieving the goals already discussed with respect to Principles 1.01 and 1.02. The Committee felt that the proportionality Principle too often is not observed or is not invoked appropriately in connection with ESI discovery. Therefore, Principle 1.03 expressly calls attention to the proportionality Principle embodied in Rule 26(b)(2)(C).

(2.) Phase One Survey Results on Principle 1.03

Attorney respondents frequently identified the focus on proportionality as the most useful aspect of the Principles. One attorney praised the Principles' "[e]xplicit discussion of the need to ensure proportionality," while another noted "[t]he focus on proportionality actually caused the parties in my case to determine that e[-]discovery would not be necessary except on limited issues." (App. F.1.b. at 50, 52.) Of those respondents who felt the Principles affected or likely would affect their cases, the vast majority thought the Principles were having a positive effect on the ability to zealously represent clients, fairness, the ability to get needed discovery, and the ability to get information about their opponents' efforts to preserve and collect ESI. (*Id.* at 36- 40.) This suggests that the call for a significant focus on proportionality of discovery is welcome and generally is not seen as impeding the just determination of cases.

(3.) Committee's Phase One Recommendation on Principle 1.03

Principle 1.03 appears to be well received and no significant revisions appear to be necessary at this time. It should be subjected to continued testing in Phase Two of the Pilot Program.

(4.) Phase Two Survey Results on Principle 1.03

Survey Two results roughly approximate the results in Survey One, and do not suggest any controversy over either of Principle 1.03's incorporation of the proportionality standard articulated in Fed.R.Civ.P. 26(b)(2)(C), or the requirement for targeted, clear, and specific ESI discovery requests.

On the question of the level of cooperation between counsel in ensuring proportionality consistent with the factors of Fed.R.Civ.P. 26(b)(2)(C), the most common attorney respondent response (thirty-seven percent (37%)) was "not applicable," representing a de minimis (one percentage point (1%)) drop from Survey One; however, forty-four percent (44%) reported that the level was adequate or excellent, while twenty percent (20%) reported that the level was poor [a drop of two (2%) and four percentage (4%) points, respectively]. (Table A-19.) While nineteen percent (19%) of attorney respondents reported that the proportionality factors set forth in Fed.R.Civ.P. 26(b)(a)(2)(C) played a significant role in the development of a discovery plan (Table A-14), it represented a two-percentage point drop from Survey One. It should be noted, however, that nineteen percent (19%) of attorney respondents reported that the application of the Principles decreased or greatly decreased discovery costs (a four percentage (4%) point drop compared with Survey One), while twenty-seven percent (27%) reported that that Pilot application to their case increased discovery costs (only five percent (5%) reported greatly increased). (Table A-27.) Further, nineteen percent (19%) of attorney respondents reported that application of the Principles either decreased or greatly decreased total litigation costs (a drop of two percentage points from Survey One), while twenty-six (26%) reported that they increased or greatly increased total litigation costs (an increase of four percentage points (4%) from Survey One). (Table A-28.) One attorney respondent found the "emphasis on proportionality" to be one of the most useful aspects of the Pilot Program. Another attorney respondent reported that the aspect of the Pilot Program found to be useful was "[t]he requirement of meeting early to define boundaries and discuss e-discovery issues; proportionality. I feel the requirement that discovery be proportional required the other side to focus and not fish (wasting resources)."

Fully sixty-three percent (63%) of judge respondents reported that the proportionality standards set forth in Fed.R.Civ.P. 26(b)(2)(C) played a significant role in the development of discovery plans for their Pilot Program cases (Table J-4), while forty-eight percent (48%) of judge respondents reported that the application of the Principles had decreased or greatly decreased the number of discovery disputes brought before the court. (Table J-13.) One judge respondent reported that the proportionality and meet and confer requirements were aspects of the Pilot Program Principles found most useful. Another judge respondent commented that "…the emphasis on cooperation and

proportionality cut down the discovery disputes that arise and decrease the frustration level on the part of counsel and their clients toward the litigation process as a whole."

(5.) Committee's Phase Two Recommendation as to Principle 1.03

Principle 1.03 continues to be well received and no significant revisions appear to be necessary at this time. It should be subjected to continued testing and evaluation in Phase Three of the Pilot Program.

D. Principle 2.01 (Duty to Meet and Confer on Discovery and to Identify Disputes for Early Resolution)

(NOTE: Principle 2.01 was modified after Phase One, and therefore, the version set forth below shows the modifications that were made.)

(a) Prior to the initial status conference with the Court, counsel shall meet and discuss the application of the discovery process set forth in the Federal Rules of Civil Procedure and these Principles to their specific case. Among the issues to be ~~considered for discussion~~discussed are:

(1) the identification of relevant and discoverable ESI and documents, including methods for identifying an initial subset of sources of ESI and documents that are most likely to contain the relevant and discoverable information as well as methodologies for culling the relevant and discoverable ESI and documents from that initial subset (see Principle 2.05);

(2) the scope of discoverable ESI and documents to be preserved by the parties;

(3) the formats for preservation and production of ESI and documents;

(4) the potential for conducting discovery in phases or stages as a method for reducing costs and burden; and

(5) the potential need for a protective order and any procedures to which the parties might agree for handling inadvertent production of privileged

information and other privilege waiver issues ~~under~~pursuant to Rule 502(d) or (e) of the Federal Rules of Evidence.

(b) Disputes regarding ESI that counsel for the parties are unable to resolve shall be presented to the Court at the initial status conference, Fed. R. Civ. P. Rule 16(b) Scheduling Conference, or as soon as possible thereafter.

(c) ~~Disputes regarding EDI will be resolved more efficiently if, before meeting with opposing counsel, the~~The attorneys for each party shall review and understand how their client's data is stored and retrieved before the meet and confer discussions in order to determine what issues must be addressed during the meet and confer discussions.

(d) If the Court determines that any counsel or party in a case has failed to cooperate and participate in good faith in the meet and confer process or is impeding the purpose of these Principles, the Court may require additional discussions prior to the commencement of discovery, and may impose sanctions, if appropriate.

(1.) Committee's Reasoning for Principle 2.01

The Federal Rules of Civil Procedure already require parties to meet and confer at the outset of cases, and throughout the progress of cases, on discovery matters. Principle 2.01(a) reinforces these requirements and sets the stage for subsequent Principles which elaborate on the topics of discussion for which, in some cases, the Rules provide little in the way of specifics. The "identification" of relevant and discoverable ESI is addressed in more detail in Principle 2.05. The "scope of discoverable ESI to be preserved" is addressed in more detail in Principle 2.04. The "format[] for preservation and production of ESI" is addressed in more detail in Principle 2.06. Principle 2.01(a) also reinforces the requirement in the Rules to consider the potential for conducting discovery in phases or stages, with an emphasis on using this procedure as a method for "reducing costs and burden." Finally, Principle 2.01(a) draws attention to Rule 502 of the Federal Rules of Evidence and encourages parties to consider whether they can reduce costs by taking advantage of a Rule 502(d) order providing for non-waiver of privilege despite even intentional disclosure. As a result of the survey data from Phase One, Principle 2.01 was strengthened in Phase Two, as shown in the comparison version above.

Principle 2.01(b)'s requirement that parties "shall" promptly raise disputes that have been, or should have been, identified in the meet and confer process adds teeth to Principle 1.01's stated goal of encouraging "the early resolution of disputes regarding the discovery of ESI." Both parties to a

case too often perceive an advantage in putting off difficult issues concerning preservation and discovery of documents and ESI. This attitude undermines the Principles' goals of encouraging the early identification and resolution of disputes and changing the adversarial culture of discovery. Principle 2.01(b) therefore seeks to incentivize parties to discuss and raise such issues promptly. The risk of ignoring the mandate is that the presiding judge may refuse to hear an issue that should have been raised earlier. This potential for waiver creates an incentive for parties to make their opponents aware of thorny issues as soon as possible so that, if the opponents do not raise the issue with the court promptly, they can invoke Principle 2.01(b) in their waiver argument. By the same token, Principle 2.01(b) discourages lying in wait concerning a perceived shortfall of one's opponent.

It is also important to note Principle 2.01(b) recognizes that preservation and discovery are part of an ongoing process that continues throughout the progress of the case. Issues that are, or reasonably should be, identified before the initial status conference must be raised by that time. Other issues will not be apparent to either party until the case has progressed further. Parties will not be faulted for not identifying those issues earlier. However, parties must raise such issues promptly once they have been identified.

Principle 2.01(c) makes the point that lawyers cannot fulfill the purpose and specific requirements of the Principles unless they take the necessary steps to understand their clients' information systems. The nature of the information that must be understood can be gleaned largely from the content of the other Principles.

Principle 2.01(d) sets out two potential consequences for a failure to meaningfully participate and cooperate in the meet and confer process. One potential consequence is that the presiding judge may delay the commencement of discovery. This option may be appropriate when the recalcitrant litigant is attempting to begin discovery on its opponent, while at the same time failing to meaningfully participate in the prescribed meet and confer process. The second potential consequence set forth in Principle 2.01(d) simply reinforces that the court may impose sanctions.

(2.) Phase One Survey Results on Principle 2.01

The Survey responses do not suggest any controversy over the purpose of Principle 2.01. Indeed, the Survey responses frequently identified the most useful aspects of the Principles as the encouragement of an early focus on e-discovery issues, and one attorney specifically named Principle 2.01(a) as the most useful aspect of the Principles. (App. F.1.b. at 51.) A representative respondent stated that the most useful aspect of the Principles is "[g]etting parties to focus on e-discovery early by highlighting issues in a case up front." (*Id.*) Another respondent reported that "[m]erely focusing the parties' and the court's attention on these issues has been helpful in moving the case forward

more efficiently and saving my client money." (*Id.*) More generally, one respondent praised "[t]he detailed clarification of the obligations of the parties." (*Id.* at 52.) Of those attorney respondents who felt the Principles affected or likely would affect their cases, the vast majority thought the Principles were having a positive effect on the amicable resolution of issues and the ability to get information about their opponents' efforts to preserve and collect ESI. (*Id.* at 37, 40.) More than nine (9) out of ten (10) judge respondents indicated that the Principles had a positive effect on counsels' demonstrated level of attention to the technologies affecting the discovery process and counsels' familiarity with their own clients' electronic data and data systems. (App. F.1.a. at 18-19.) A solid majority of judge respondents also indicated that the Principles had a positive effect on the judges' understanding of the parties' electronic data and data systems for the appropriate resolution of disputes. (*Id.* at 20.) Principle 2.01 appears to be having a positive effect. However, there appears to be room for improvement in compliance.

While most attorneys are following the guidance of Principle 2.01(a) and (c), a significant minority still is not. Where applicable, a majority of attorney respondents reported that they familiarized themselves with their clients' information systems and had early discussions with their opponents about ESI preservation issues and methods for identifying relevant ESI. (App. F.1.b. at 22-23.) The judges also reported that these things appeared to be occurring. (App. F.1.a. at 18-20.) Curiously, though, a substantial minority of attorneys reported that they did not do these things despite acknowledging that the issues were applicable to their case. (App. F.1.b. at 22-23.)

The requirement of Principle 2.01(b) that disputes be raised with the court promptly does not appear to be followed regularly. To the extent there were unresolved issues at the time of the initial status, only twenty-five percent (25%) of respondents reported that they were raised at the initial status. (App. F.1.b. at 24-25.) To the extent that issues arose after the initial status hearing, only fifty-six percent (56%) reported that the issues were raised promptly thereafter. (*Id.*) A majority of judge respondents indicated that the Principles had a positive effect on the promptness with which the parties raised unresolved discovery disputes with the court and the parties' ability to obtain relevant documents. (App. F.1.a. at 13-14.) According to the attorneys, however, there remains room for more improvement.

(3.) Committee's Phase One Recommendation on Principle 2.01

Principle 2.01 seems to be on the right track encouraging an early focus on issues concerning preservation and discovery of ESI, where applicable. However, Principle 2.01 may be only partially effective in achieving its aims. The Committee might consider strengthening Principle 2.01 in Phase Two of the Pilot Program. (Note: The Committee did strengthen Principle 2.01 for Phase Two as indicated by the comparison version printed above.)

(4.) Phase Two Survey Results on Principle 2.01

Principle 2.01, as modified for Phase Two, requires early discussion of subjects that are treated in more detail in subsequent Principles and sets forth a framework of incentives to encourage litigants to do so. One attorney respondent summed this up as follows: "early meet and confer with 'teeth' discouraging bad behavior by litigants." Because Principle 2.01 is an overarching Principle, evaluating it requires an overview of most of the survey results. The data suggest that the Principles promote cooperation and ability to resolve disputes amicably, ability to obtain relevant documents and zealously represent clients, and fairness. But these gains may have come in exchange for at least some increased cost and delay.

The attorney respondents reported that in most cases the Principles had no effect with respect to most of the metrics the Committee sought to measure, including: the levels of cooperation (sixty-two percent (62%)), the ability to zealously represent clients (seventy-one percent (71%)), the ability to resolve disputes without court involvement (sixty-one percent (61%)), the fairness of the e-discovery process (fifty-five percent (55%)), the ability to obtain relevant documents (seventy percent (70%)), the incidence of allegations of spoliation or other sanctionable conduct (sixty-eight percent (68%)), the number of discovery disputes (fifty-five percent (55%)), the incidence of discovery about another party's efforts to preserve and collect ESI (sixty-four percent (64%)), the total costs of discovery (fifty-four percent (54%)), the total cost of litigation (fifty-six percent (56%)), the length of the discovery period (sixty-six percent (66%)), and the length of the litigation (seventy percent (70%)). The survey data do not provide quantitative data to understand why this was so. But there is qualitative data in the narrative comments to suggest that many cases settle early or before discovery becomes a major issue, many do not involve much discovery, and sophisticated parties often are able to work things out themselves. The lack of a perceived effect in many cases is not surprising or troubling. The Principles did have perceived effects on important metrics, ranging from twenty-six percent (26%) to forty-five percent (45%) of the cases depending for various metrics. It is in these cases where the Principles are potentially important and should be evaluated.

In those cases in which the Principles did have a perceived effect those effects were overwhelmingly positive with respect to cooperation and ability to resolve disputes amicably, ability to obtain relevant documents and zealously represent clients, and fairness. Attorneys reported that the Principles improved levels of cooperation in thirty-six percent (36%) of the cases and decreased it in two percent (2%). Attorneys reported that the Principles increased the ability to zealously represent clients in twenty-five percent (25%) of the cases, and decreased it in three percent (3%). Attorneys reported that the Principles improved the ability to resolve disputes without court involvement in thirty-five percent (35%) of the cases, and decreased it in four percent (4%). Attorneys reported that the Principles increased the fairness of the e-discovery process in forty

percent (40%) of the cases, and decreased it in five percent (5%). Attorneys reported that the Principles increased the ability to obtain relevant documents in twenty-eight percent (28%) of the cases, and decreased it in two percent (2%). The judges agree. Of the judge respondents: seventy-eight (78%) reported improved cooperation (twenty-two percent (22%) greatly) and none reported decreased cooperation; seventy-five percent (75%) reported that the Principles increased or greatly increased the fairness of the e-discovery process (nineteen percent (19%) greatly) and none observed decreased fairness; sixty-six percent (66%) reported that the Principles increased ability to obtain relevant documents and none felt access was diminished. The consensus view then is that the Principles result in more cooperation, more access to needed information and more fairness.

On the other hand, in those cases in which the Principles were perceived to have an impact, the consensus view among attorneys appears to be that the Principles resulted in more discovery disputes, more discovery on discovery, longer discovery periods, and greater expense for discovery and the litigation in general. So, according to the attorneys, the gains in cooperation, access and fairness appear to have come at a cost. However, the increased costs were considered to be great in only a small percentage of the cases. Attorneys reported that the Principles increased the incidence of charges of spoliation and other sanctionable discovery misconduct in twenty-four percent (24%) of the cases (three percent (3%) greatly), and decreased it in eight percent (8%) (two percent (2%) greatly). The Principles were perceived to increase the incidence of all types of discovery disputes in twenty-four percent (24%) of the cases (four percent (4%) greatly), and to decrease the incidence in twenty-two percent (22%) (two percent (2%) greatly). Attorneys reported that the Principles increased the total costs of discovery in twenty-seven percent (27%) of the cases (five percent (5%) greatly), and decreased it in nineteen percent (19%) (one percent (1%) greatly). Attorneys reported that the Principles increased the incidence of discovery on another party's efforts to preserve and collect ESI in thirty-two percent (32%) of the cases (three percent (3%) greatly), and decreased it in four percent (4%) (one percent (1%) greatly). Attorneys reported that the Principles increased the length of the discovery period in twenty-four percent (24%) of the cases (three percent (3%) greatly), and decreased it in eleven percent (11%) (one percent (1%) greatly). Attorneys reported that the Principles increased the length of the litigation in general in twenty percent (20%) of the cases (two percent (2%) greatly), and decreased it in nine percent (9%) (one percent (1%) greatly). Attorneys reported an increase in the total cost of litigation in twenty-six percent (26%) of the cases (four percent (4%) greatly), and a decrease in nineteen percent (19%) (one percent (1%) greatly).

The Committee anticipated that the Principles might increase the incidence of discovery disputes, at least initially. The Principles seek to encourage and create an incentive for earlier and more fulsome discussion of potentially thorny discovery issues because these issues are usually easier to resolve the earlier they are addressed. In the Phase One Report, the Committee noted that "any reduction in the number of disputes coming before the courts will only be a positive change if the

parties are cooperating and constructively resolving discovery issues, and not if the reduction occurs because the parties are being discouraged from seeking relief when needed." Given the consensus that the Principles yield gains in cooperation, access and fairness, it would appear that attorneys generally view the perceived increased costs — which were rarely considered substantial — as an acceptable trade off.

The judicial perception varies from the bar on these metrics. Forty-one percent (41%) of the judges perceived a decrease in the number of spoliation/sanctions disputes compared to eleven percent (11%) who perceived an increase. Forty-eight percent (48%) perceived a decrease in discovery disputes in general while only eight percent (8%) perceived an increase. Thirty-seven percent (37%) reported fewer cases of discovery into another party's preservation and collection efforts whereas nineteen percent (19%) reported an increase. Twenty-two percent (22%) felt that the Principles decreased the length of the discovery period, compared to fifteen percent (15%) who perceived an increase. Twenty-two percent (22%) saw the length of the litigation in general tend to decrease, while only seven percent (7%) saw an increase. The judges, on balance, see fewer disputes and speedier resolutions resulting from application of the Principles.

While there is consensus among the bench and bar that the Principles improve the "just" resolution of cases, it remains unclear to what extent the Principles also promote the more "speedy" and "inexpensive" determination of cases. The attorney respondents seem to believe the Principles, more often than not, moderately increase discovery disputes, delay and costs. The judge respondents feel otherwise. It remains to be determined whether the Principles ultimately will reduce the incidence of discovery disputes and the costs of litigation as the bar's knowledge and culture around e-discovery matures.

(5.) Committee's Phase Two Recommendation as to Principle 2.01

Principle 2.01 and the other Principles to which it relates seem to promote cooperation and ability to resolve disputes amicably, ability to obtain relevant documents and zealously represent clients, and fairness. These gains seem to have come in exchange for at least some increased cost and delay, which the Committee anticipated might be the initial experience as litigants began engaging on e-discovery issues earlier and more substantively. In further phases the Committee should seek to measure whether any increased costs and delays are reasonable in light of the benefits that are being achieved, and whether any perceived increases in these metrics persist or diminish with further education and experience.

E. Principle 2.02 (E-Discovery Liaison(s))

In most cases, the meet and confer process will be aided by participation of an e-discovery liaison(s) as defined in this Principle. In the event of a dispute concerning the preservation or production of ESI, each party shall designate an individual(s) to act as e-discovery liaison(s) for purposes of meeting, conferring, and attending court hearings on the subject. Regardless of whether the e-discovery liaison(s) is an attorney (in-house or outside counsel), a third party consultant, or an employee of the party, the e-discovery liaison(s) must:

(a) be prepared to participate in e-discovery dispute resolution;

(b) be knowledgeable about the party's e-discovery efforts;

(c) be, or have reasonable access to those who are, familiar with the party's electronic systems and capabilities in order to explain those systems and answer relevant questions; and

(d) be, or have reasonable access to those who are, knowledgeable about the technical aspects of e-discovery, including electronic document storage, organization, and format issues, and relevant information retrieval technology, including search methodology.

(1.) Committee's Reasoning for Principle 2.02

The experience of lawyers with the technical aspects of ESI varies widely. The judges on the Committee noted the frequency of counsel appearing before them on electronic discovery disputes who do not appear to have a good understanding of the issues at hand. The Committee felt that the result of many lawyers' lack of technical expertise on ESI issues was an increase in the reluctance of parties to discuss ESI issues at the meet and confer and in the likelihood of ESI disputes being presented to the court. Principle 2.02, therefore, requires that when there is a dispute about technical matters the use of an ESI liaison is mandatory. Principle 2.02 does not require that the liaison be an information systems employee of the party or a third party expert. The liaison can be anyone, including trial counsel. The only requirements are that the liaison be available and competent to discuss the technology issues that are the subject of the dispute. A lawyer who lacks such competence and lacks the inclination to acquire such competence must involve a liaison who possesses the necessary technical expertise.

Because technology can be very complex, it is not realistic to expect anyone to anticipate and master every possible question that may arise in the course of discussions or court hearings concerning ESI. Also, litigants and counsel may be concerned about placing non-lawyers in direct contact with opponents or the court. For this reason, Principle 2.02 requires the liaison to have either the requisite knowledge or reasonable access to those who have the requisite knowledge. A liaison may not know the answer to an unanticipated technical question, but should be reasonably prepared on the matters at hand and be prepared to contact the relevant subject-matter experts as necessary.

(2.) Phase One Survey Results on Principle 2.02

Almost ninety percent (90%) of attorney respondents who had a discovery liaison, and all of the judge respondents, felt that liaisons made for a more efficient discovery process. (App. F.1.b. at 47; App. F.1.a. at 21.) About seventy-five percent (75%) of the attorneys felt the same way about their opponent's liaison. (App. F.1.b. at 48.) Discovery liaisons included technical employees (twenty-eight percent (28%)), inside counsel (twenty percent (20%)), outside counsel (fifteen percent (15%)), and consultants (ten percent (10%)). (*Id.* at 45.) Not surprisingly, this Principle was mentioned positively in many of the written comments to the question regarding which aspects of the Principles were most useful. As one judge wrote, "[d]esignating liaison is the single best idea — it helps focus the discovery requests." (App. F.1.a. at 24.)

(3.) Committee's Phase One Recommendation on Principle 2.02

Principle 2.02 appears to be very well received and no revisions appear to be necessary at this time. It should be subjected to continued testing in Phase Two of the Pilot Program.

(4.) Phase Two Survey Results on Principle 2.02

Principle 2.02 introduced the e-discovery liaison and the survey responses indicate that the use of liaisons has been frequent. Attorneys Respondents reported liaison use in sixty-four percent (64%) of the cases. Where liaisons were used, the liaison was an employee of the party more than eighty percent (80%) of the time (in-house counsel about thirty percent (30%) of the time and other employees the other fifty percent (50%) of the time). The balance was split equally between third party consultants and outside counsel.

Principle 2.02's e-discovery liaison continues to be one of the most successful innovations. All of the judge respondents whose cases involved liaisons (sixty-eight percent (68%) of them) believed that the liaisons contributed to a more efficient discovery process, with thirty-three percent (33%) feeling strongly about it. The attorneys also are quite positive about the liaisons. In the cases in

which a liaison was used: (a) ninety-four percent (94%) of the attorneys felt that their own liaison contributed to a more efficient discovery process, while six percent (6%) felt their own liaison did not improve efficiency (but none felt this way strongly); and (b) a little more than eighty percent (80%) of the attorneys felt that their opponent's liaison contributed to a more efficient discovery process, while a little over nineteen percent (19%) felt their opponent's liaison did not improve efficiency (only a fraction of a percent felt so strongly).

The survey data does not track the reasons for the small percentage of respondents who expressed negative views about liaisons. Some anecdotal comments suggest that at least some of the negative views come from lawyers who feel that the costs may outweigh the benefits:

> "Most disputes do not warrant the expense of bringing in outside computer consultants and the cost to litigate on ediscovery issues ends up costing more than the issue at hand."

> "Having a computer consultant was very helpful, but costly. Cost should be allocated more fairly."

These comments do not seem to be warranted where Principle 2.02 is properly applied. Principle 2.02 requires use of a liaison only when there is a discovery dispute that involves technical ESI issues. And the liaison can be anyone who understands the technical issue well enough to address it intelligently with the Court, including even the party's attorney. The very suggestion that it is overly burdensome for counsel to acquire (or else hire) basic competence in the technical question being presented to the Court is evidence of the precise problem that 2.02 seeks to remedy.

One attorney respondent also suggested that he was obstructed by an opponent's *attorney* liaison:

> "[A]llowing an attorney to be the liaison allows counsel to obstruct the information."

It is unclear why a judge would grant more leeway to obstruct on technical issues to a liaison who is an attorney as opposed to, say, an information systems professional. Nor is it clear whether the respondent sought the judge's assistance. In any event, prohibiting attorneys from serving in the role would be arbitrary and tend to exacerbate the complaints about driving up costs.

The few negative views that were reported in the survey results do not appear to be well grounded. And they are vastly outweighed by positive views.

(5.) Committee's Phase Two Recommendation as to Principle 2.02

Principle 2.02 continues to be very well received. No change is recommended at this time.

F. Principle 2.03 (Preservation Requests and Orders)

(a) Appropriate preservation requests and preservation orders further the goals of these Principles. Vague and overly broad preservation requests do not further the goals of these Principles and are therefore disfavored. Vague and overly broad preservation orders should not be sought or entered. The information sought to be preserved through the use of a preservation letter request or order should be reasonable in scope and mindful of the factors set forth in Rule 26(b)(2)(C).

(b) To the extent counsel or a party requests preservation of ESI through the use of a preservation letter, such requests should attempt to ensure the preservation of relevant and discoverable information and to facilitate cooperation between requesting and receiving counsel and parties by transmitting specific and useful information. Examples of such specific and useful information include, but are not limited to:

(1) names of the parties;

(2) factual background of the potential legal claim(s) and identification of potential cause(s) of action;

(3) names of potential witnesses and other people reasonably anticipated to have relevant evidence;

(4) relevant time period; and

(5) other information that may assist the responding party in assessing what information to preserve.

(c) If the recipient of a preservation request chooses to respond, that response should provide the requesting counsel or party with useful information regarding the preservation efforts undertaken by the responding party. Examples of such useful and specific information include, but are not limited to, information that:

(1) identifies what information the responding party is willing to preserve and the steps being taken in response to the preservation letter;

(2) identifies any disagreement(s) with the request to preserve; and

(3) identifies any further preservation issues that were not raised.

(d) Nothing in these Principles shall be construed as requiring the sending of a preservation request or requiring the sending of a response to such a request.

(1.) Committee's Reasoning for Principle 2.03

One of the primary problem areas that the Committee identified from the outset is the issue of over broad and counterproductive evidence preservation demands and responses. Demands that another party preserve evidence all too often provide nothing but a generic laundry list of the kinds of computer systems and data storage devices that exist in the world today. The Committee felt that these sorts of broad preservation demands do not promote the just, speedy, and inexpensive resolution of the case and are not reasonably designed to identify relevant categories or sources of information. These types of broad demands tend to result in similarly generic responses. As a result, the sending and answering of letters demanding preservation of evidence tend to prevent rather than promote the meaningful exchange of information, which is a missed opportunity for both parties.

Principle 2.03(a) observes that while "appropriate" preservation requests can further the goals of the Principles, "vague and overly broad" preservation requests do not and are "disfavored." The scope of the duty to preserve evidence includes evidence that reasonably can be identified as likely to be relevant and discoverable. It does not require preservation of all available sources of information just because the possibility always exists that some source of potentially relevant evidence has been overlooked. Laundry lists of systems and storage devices proceed from the opposite assumption, which is the reason Principle 2.03(a) expressly discourages them.

Principle 2.03(a) also provides that preservation demands "should be reasonable in scope and mindful of the factors set forth in Rule 26(b)(2)(C)." In other words, the proportionality Principle applies to preservation demands as much as it does to discovery demands. Overly broad preservation can be as serious a cost problem as overly broad searches and productions.

Whereas Principle 2.03(a) seeks to identify and discourage unhelpful practices, Principle 2.03(b) is intended to identify potentially productive uses of preservation demands. The duty to preserve evidence is triggered by knowledge of actual or reasonably anticipated litigation. One productive

use of a preservation demand is to make one's opponent aware that future litigation is likely. Receipt of a letter threatening suit or demanding preservation of evidence can be a factor in determining whether a pre-litigation duty to preserve evidence has been triggered.

Another productive use of a preservation demand is to provide information that helps one's opponent identify the scope of evidence that is likely to be relevant and discoverable in the case. Principle 2.03(b) identifies a number of examples of the sort of specific and actionable information that can constructively help one's opponent identify the subset of documents and ESI that should be preserved. Reference must also be made to Principle 2.04(d), which identifies several specific preservation steps that ordinarily are not required and must be expressly demanded if one considers them important in a given case. There will not always be agreement about the subjects and classes of documents and ESI that are so identified, and such materials do not automatically become relevant and discoverable just because they are demanded. But specific and actionable disputes concerning the appropriate scope of preservation can in this way be identified and often resolved early as required by Principle 2.01(b), before the information is no longer available. Such constructive preservation demands can also be effective pre-suit, as the recipient of a constructive preservation demand that thoughtfully identifies relevant subjects and classes of information will find it more difficult to explain non-preservation if the court later finds the evidence was relevant and discoverable.

Principle 2.03(c) provides guidance on how to constructively approach responding to a preservation demand. Just as a preservation demand should be constructive and specific, a response or even a unilateral preservation disclosure is useful only to the extent it identifies a specific and actionable issue. A party considering responding to a preservation demand, or initiating a preservation disclosure, should view it as an opportunity to put one's opponent on notice of a potentially controversial preservation issue. This Principle appeals to the notion of cooperation (*see* Principle 1.02) and the importance of counsel's role as an "officer of the court" in seeking to identify and resolve issues early, before they become more complex and combative spoliation problems. This Principle also appeals to the adversarial instinct which the Committee hopes will more and more be drawn to the opportunity to make one's adversary aware of a preservation issue that it then must raise or risk waiving (*see* Principle 2.01(b)).

Principle 2.03(d) makes very clear that the Principles do not require that a party send a preservation demand or respond to one. The Committee clarified this point out of concern that the guidance on how to effectively utilize preservation demands and responses might lead some readers to believe that such letters and responses were required or encouraged. Quite the contrary, the Committee believes that preservation demand letters are usually unnecessary and only rarely can be

constructive. Similarly, there is little purpose in responding to preservation demand letters, at least where they are of the generic, laundry list variety.

(2.) Phase One Survey Results on Principle 2.03

In only seven percent (7%) of the cases did the respondents report some effect on preservation letters. (App. F.1.b. at 49.) Given the short time period of Phase One implementation and Survey evaluation, as well as the stage at which many cases entered the Pilot Program, this is not surprising. Of those attorneys who did report an effect, all indicated that the Principles resulted in more targeted letters.

(3.) Committee's Phase One Recommendation on Principle 2.03

It is too early to draw conclusions about Principle 2.03. It does appear that it is tending to achieve its aim of promoting more thoughtful preservation letters where they are used. This Principle should be further tested in Phase Two.

(4.) Phase Two Survey Results on Principle 2.03

The survey asked the attorneys if the Principles affected the parties' use of preservation letters. In response, more than twice as many respondents (sixteen percent (16%)) said that their preservation letters were more targeted in Phase Two versus in Phase One (only seven percent (7%)). (Table A-35.) A large percentage of respondents, however, stated that the Principles have had no effect on preservation letters (ninety-three percent (93%) in Phase One and eighty-three percent (83%) in Phase Two). (*Id.*)

(5.) Committee's Phase Two Recommendation as to Principle 2.03

It appears that Principle 2.03 is helping litigants draft more narrowly tailored preservation letters, to the extent the parties send such letters at all. This is consistent with the Committee's belief that overbroad, boilerplate preservation demands are not productive.

On the other hand, the vast majority of litigants think this Principle has no effect. This may be a result of preservation letters not being used at all in many cases. For instance, preservation letters are uncommon in certain areas of law where threats of litigation can lead to declaratory judgment suits, such as in intellectual property disputes. Preservation letters also are uncommon in smaller cases, making Principle 2.03 inapplicable in those cases.

In the end, the Committee recommends no changes to Principle 2.03 at this time.

G. Principle 2.04 (Scope of Preservation)

(a) Every party to litigation and its counsel are responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control. Determining which steps are reasonable and proportionate in particular litigation is a fact specific inquiry that will vary from case to case. The parties and counsel should address preservation issues at the outset of a case, and should continue to address them as the case progresses and their understanding of the issues and the facts improves.

(b) Discovery concerning the preservation and collection efforts of another party may be appropriate but, if used unadvisedly, can also contribute to the unnecessary expense and delay and may inappropriately implicate work product and attorney-client privileged matter. Accordingly, prior to initiating such discovery a party shall confer with the party from whom the information is sought concerning: (i) the specific need for such discovery, including its relevance to issues likely to arise in the litigation; and (ii) the suitability of alternative means for obtaining the information. Nothing herein exempts deponents on merits issues from answering questions concerning the preservation and collection of their documents, ESI, and tangible things.

(c) The parties and counsel should come to the meet-and-confer conference prepared to discuss the claims and defenses in the case, including specific issues, time frame, potential damages, and targeted discovery that each anticipates requesting. In addition, the parties and counsel should be prepared to discuss reasonably foreseeable preservation issues that relate directly to the information that the other party is seeking. The parties and counsel need not raise every conceivable issue that may arise concerning their preservation efforts; however, the identification of any such preservation issues should be specific.

(d) The following categories of ESI generally are not discoverable in most cases, and if any party intends to request the preservation or production of these categories, then that intention should be discussed at the meet and confer or as soon thereafter as practicable:

(1) "deleted," "slack," "fragmented," or "unallocated" data on hard drives;

(2) random access memory (RAM) or other ephemeral data;

(3) on-line access data such as temporary internet files, history, cache, cookies, etc.;

(4) data in metadata fields that are frequently updated automatically, such as last-opened dates;

(5) backup data that is substantially duplicative of data that is more accessible elsewhere; and

(6) other forms of ESI whose preservation requires extraordinary affirmative measures that are not utilized in the ordinary course of business.

(e) If there is a dispute concerning the scope of a party's preservation efforts, the parties or their counsel must meet and confer and fully explain their reasons for believing that additional efforts are, or are not, reasonable and proportionate, pursuant to Rule 26(b)(2)(C). If the parties are unable to resolve a preservation issue, then the issue should be raised promptly with the Court.

(1.) Committee's Reasoning for Principle 2.04

Principle 2.04 addresses preservation of ESI. The Committee feels that litigants often struggle with evidence preservation concerns at least as much as they do with concerns about the scope and costs of producing documents and ESI.

Principle 2.04(a) provides that the scope of preservation is subject to the limits of reasonableness and proportionality. Furthermore, the scope of preservation is limited to that which is "discoverable," a term which incorporates all of the various limitations on discovery in the Federal Rules of Civil Procedure. As a result, a litigant need not retain sources of information that are not likely to contain information that will be discoverable. Principle 2.04(a) also recognizes that evidence preservation is an evolving process. What a party should know is discoverable is based on the information available to that party at the time of the decision whether to preserve the source of information. The fact that a certain employee's significance to a case has become apparent three (3) years into the case does not demonstrate that the disposal of that employee's information two years

prior was improper. The duty to preserve is assessed based on the information available at the time that the litigant disposes of the information, not on the basis of hindsight.

Principle 2.04(b) is meant to address the issue of discovery on discovery. Too often litigants immediately launch into detailed, formal discovery on the subject of their opponent's evidence preservation and discovery steps. This discovery tends to seek excruciating detail about information systems and legal department activities. The former tend to veer widely into the legally insignificant. The latter tend to involve privilege and work product concerns because lawyers and paralegals usually can best supply the requested information. The Committee believes that the best way for parties to exchange necessary information about their respective preservation and discovery steps is informally through the meet and confer process set forth in the Principles, which should reduce or eliminate the need for formal discovery on these topics. Therefore, Principle 2.04(b) strongly encourages informal cooperation in exchanging this information and requires that a party first explore and exhaust this avenue before resorting to formal discovery methods; parties nevertheless may still ask merits deponents about their own documents and ESI.

Principle 2.04(c) echoes Federal Rule of Civil Procedure 26 in instructing litigants to come to the meet and confer sessions prepared to address reasonably foreseeable evidence preservation issues. Failing to identify such issues as they relate to one's adversary may result in waiver. (*See* Principle 2.01(b).) Conversely, failing to identify such an issue with respect to one's own preservation approach misses the opportunity to resolve a grey area by early judicial decision or waiver. (*Id.*) The Committee added the final sentence of Principle 2.04(c) out of concern that some might read this Principle as expecting a party to identify every conceivable issue concerning its own evidence preservation efforts that could theoretically be resolved early by the judge, lest that party be accused of hiding the ball in a subsequent discovery or sanctions motion. This sentence makes clear that judges should not expect litigants to identify every conceivable issue concerning their own evidence preservation efforts, which is not realistic. But the meet and confer process should be regarded as an opportunity to resolve troublesome issues before they become more complex and avoid combative spoliation disputes.

Principle 2.04(d) offers specific categories of ESI that "generally are not discoverable in most cases" and requires a party who intends to request their "preservation or production" to raise the issue promptly. The first category is "deleted," "slack," "fragmented," or "unallocated" data on hard drives. This sort of information can be preserved and recovered only with specialized forensic tools at increased expense and can dramatically increase the amount of data to be collected, processed, and reviewed. To be sure, in certain cases these extraordinary measures will be warranted, but these are the exception.

The second category is random access memory ("RAM") and other "ephemeral" data. RAM is the storage location for software applications and data that a computer is actively using. Unless saved to a hard drive, or other durable storage location, RAM disappears when the computer is powered off. In rare cases, tending to involve disputes concerning software code, RAM may be relevant and discoverable.

The third category is "on-line access data such as temporary internet files, history, cache, cookies, etc." Collecting this sort of information can dramatically increase the amount of data to be collected, processed, and reviewed, and the associated discovery costs. In most cases such ESI is unlikely to be relevant or discoverable.

The fourth category is "metadata fields that are frequently updated automatically, such as last-opened dates." Many litigants do not have ESI collection tools that can collect data without affecting such metadata fields. Using vendors to perform a forensically sound collection adds expense. Because the last-opened metadata field rarely will be the key to resolving most civil cases, the increased cost generally will not be warranted.

The fifth category is backup data that is "substantially duplicative of data that is more accessible elsewhere." Here the Committee had in mind backup tapes that contain snapshots of active systems a short period of time before the litigant implemented a reasonable and proportionate legal hold to preserve data on the active systems, as well as backups that will subsequently take snapshots of those active systems as the case proceeds. Absent unusual circumstances, such as a recent crash or purge of the active systems, the ESI contained on such backup tapes is unlikely to contain substantially more relevant and discoverable ESI than is available from the more readily searchable, active computer systems. Retaining substantially duplicative backup tapes adds costs. But even more importantly, forcing a party to retain backup tapes unnecessarily leads to those tapes aging to a point where they can contain data that is substantially different from the data available on the active system which can make these tapes difficult or impossible to ever recycle. This defeats a company's legitimate records management program and potentially drives up the costs of unrelated, future litigation.

The sixth category is a catchall: "other forms of ESI whose preservation requires extraordinary affirmative measures that are not utilized in the ordinary course of business." The Committee has in mind specific examples that fall within this category but, in light of the rapidly evolving technology sector, decided to state the concept in general terms so as to avoid technical obsolescence over time. The specific examples the Committee has in mind are email "journaling" and IM "logging." These are processes that capture all email and IM as they are sent or received on a company's computer systems. These processes are rarely used outside of financial services firms,

which are subject to specific regulatory retention requirements with respect to their communications. The Committee believes that companies ordinarily should not be expected to adopt such technology solely for litigation purposes.

The Committee emphasizes that these categories are not placed beyond the scope of discovery in all cases. The purpose of this Principle is simply to require litigants to promptly notify their adversary if they believe their case necessitates preservation and production of ESI in one or more of these categories. However, in raising the preservation of these categories, the demanding party should keep in mind that vague and overly broad preservation demands and responses are discouraged in Principle 2.03.

Principle 2.04(e) reiterates the concept expressed elsewhere that a party who has a concern about the scope of another party's preservation efforts must raise the issue promptly with the court. The reasons for this prompt notification are the same as those explained in relation to Principle 2.01(b).

(2.) Phase One Survey Results on Principle 2.04

The survey responses frequently identified the most useful aspects of the Principles as the encouragement of early focus on electronic discovery issues and on the "detailed clarification" they provide. (App. F.1.b. at 52.) One attorney respondent, for example, found that the Principles "[e]ncourag[ed] the parties to deal with E-discovery at an early stage." (*Id.* at 50.) Of those attorney respondents who felt the Principles affected or likely would affect their cases, the majority of responding attorneys thought the Principles were having a positive effect on the level of cooperation between counsel and on the counsels' ability to get needed discovery and information about their opponents' efforts to preserve and collect ESI. (*Id.* at 35, 40.) A majority of judge respondents indicated that the Principles reduced the number of requests for formal discovery into another party's ESI preservation and collection efforts. (App. F.1.a. at 16-17.) Principle 2.04 appears to be promoting some of its goals so far but further testing is needed.

(3.) Committee's Phase One Recommendation on Principle 2.04

It is too early to draw firm conclusions about Principle 2.04, although it appears preliminarily to be achieving some of its objectives. This Principle should be further tested in Phase Two.

(4.) Phase Two Survey Results on Principle 2.04

As in Phase One, Principle 2.04 seemed to help parties focus on ESI discovery early in the process and help parties focus their ESI discovery efforts. For example, more than half of all

respondents stated that early discovery conversations with opposing counsel included the scope of ESI to be preserved and produced. (Table A-13.) More than one-third of respondents stated that the Principles helped the parties resolve ESI disputes without court intervention and increased the fairness of the ESI discovery process. (Tables A-22 and A-23.) Almost no one thought the Principles made ESI discovery harder or less fair. (*Id.*) Similarly, one-quarter of respondents thought that the Principles made it easier to obtain relevant documents, and almost no one thought that the Principles made it harder to obtain such documents. (Table A-24.)

Comments from the participating attorneys were consistent with these results. One attorney wrote that the Principles were useful because they provided an "enforceable protocol." Another attorney wrote that "guiding the parties' expectations" was useful. Others noted that the Principles provided a useful framework, but the parties still need to cooperate or the Court needs to enforce the rules.

On the other hand, respondents were evenly split regarding the Principles' impact on discovery costs and the number of discovery disputes. (Tables A-27 and A-32.) Some attorneys thought the Principles led to more spoliation allegations. (Table A-25.) And some attorneys, however, believed that discovery on discovery increased. (Table A-26.)

Judges reported a significant increase in cooperation (seventy-eight percent (78%)) among counsel, and that may be attributable, in part, to Principles like Principle 2.04, which provides presumptive limits to ESI discovery. (Table J-5.) Similarly, forty-one percent (41%) of judges believed that the Principles reduced spoliation allegations, while only eleven percent (11%) believed that the Principles increased such allegations. (Table J-10.) Again, this may be attributable to provisions like Principle 2.04(d), which expressly states that parties do not have to preserve certain types of volatile ESI. More generally, a plurality of judges thought the Principles have reduced the length of discovery, litigation, and the number of discovery disputes brought to their attention. (Tables J-11, -12, and -13.) In contrast, as stated above, some attorneys think the Principles led to more spoliation allegations. (Table A-25.)

The judges also reported a decrease in requests for discovery on discovery. (Table J-14.) Principle 2.04(b) acknowledges that discovery on discovery is allowed, but Principle 2.04(b) also limits such discovery and warns against misuse of discovery on discovery. Some attorneys, however, believed that discovery on discovery increased. (Table A-26.)

Overall, the vast majority of judges (seventy-five percent (75%)) reported that the Principles make the entire ESI discovery process fairer. (Table J-16.)

(5.) Committee's Phase Two Recommendation as to Principle 2.04

Based on the overall survey results and comments, Principle 2.04 contributes to the usefulness of the Principles. Principle 2.04 is an important part of the Principles' overall themes of proportionality, early attention to potential disputes, carefully governing discovery on discovery, and limiting expensive discovery of forms of ESI that are difficult to obtain and process. Attorneys like these guide posts and judges think the number of ESI discovery disputes has decreased. Very few people said that these concepts were detrimental to the overall goal of making ESI discovery more efficient.

Specific sections like 2.04(b) and 2.04(d) also appear to be working. The survey shows a decrease in disputes over discovery on discovery. Moreover, as reported above, respondents like the protocols and guideposts provided in section 2.04(d). Although some attorneys think the number of spoliation disputes has increased under the Principles.

To the extent the Principles can be improved, the respondents want stronger and more consistent enforcement of all rules. Judges and lawyers lament lack of cooperation, but attorney survey responses note that some lawyers and parties are just not inclined to cooperate. There are "bad guys" in the system, and the survey respondents want judges to use the rules to hold the bad actors to account.

In summary, the Committee recommends no changes to Principle 2.04. The Committee, however, believes that future surveys should include questions addressing the specific subsections of Principle 2.04. This Principle covers a number of topics, and more specific feedback from judges and attorneys may be helpful.

H. Principle 2.05 (Identification of Electronically Stored Information)

(a) At the Rule 26(f) conference or as soon thereafter as possible, counsel or the parties shall discuss potential methodologies for identifying ESI for production.

(b) Topics for discussion may include, but are not limited to, any plans to:

(1) eliminate duplicative ESI and whether such elimination will occur only within each particular custodian's data set or whether it will occur across all custodians;

(2) filter data based on file type, date ranges, sender, receiver, custodian, search terms, or other similar parameters; and

(3) use keyword searching, mathematical or thesaurus-based topic or concept clustering, or other advanced culling technologies.

(1.) Committee's Reasoning for Principle 2.05

Principle 2.05 is intended to encourage parties to cooperate in discussing the sources from which they intend to collect ESI and the methodologies they plan to use to cull the universe of collected ESI down to a production set. It is better to address issues concerning the process for identifying key employees, or other sources, from which ESI will be collected early on than near the close of discovery, or later. It is also better for parties to address methodologies that will be used to exclude ESI from the set to be reviewed by humans so as to avoid disputes down the road after these methodologies have already been implemented. Litigants commonly use tools to limit the set of ESI that will be reviewed by humans to ESI that matches certain search parameters. These tools are often set to automatically "deduplicate" large collections of ESI and to eliminate from the collection certain file types that are not likely to contain relevant information, as well as eliminating files that do not match certain key words and phrases, among other parameters. Early cooperation in developing the search parameters allows disputes to be resolved before the dispute threatens to disrupt the discovery or trial schedule, which not only assists the court in managing its calendar but also prevents the issue from becoming one of potential sanctions. More advanced technologies are also growing in use and early discussion of their use can be similarly beneficial.

(2.) Phase One Survey Results on Principle 2.05

Where applicable, over two-thirds of attorney respondents reported discussing methods for identifying ESI around the time of the Rule 26(f) conference. (App. F.1.b. at 23-24.) There were several attorney respondents who called for more guidance on the development of search terms. One responding attorney, for example, suggested "a special master type of advisor for developing keywords for ESI searches." (*Id.* at 54.)

(3.) Committee's Phase One Recommendation on Principle 2.05

It is too early to draw firm conclusions about Principle 2.05, although it appears preliminarily to be achieving some of its objectives. This Principle should be further tested in Phase Two. The Committee might reconsider whether further guidance can be offered on effective search methods.

(4.) Phase Two Survey Results on Principle 2.05

The Phase Two survey asked the attorneys if the parties discussed potential methods of identifying ESI for production at or soon after the FRCP 26(f) conference. While in Phase One 56 percent of respondents responded yes to this question, in Phase Two that number dropped slightly to forty-six percent (46%). (Table A-9.) Twenty-nine percent (29%) of respondents identified "search methodologies to identify ESI for production" as one of the topics discussed prior to commencing discovery, as compared to thirty-four percent (34%) in Phase One. (Table A-13.) In contrast with Phase One, attorney comments to the survey did not focus specifically on the need for more guidance regarding search terms. However, one attorney respondent asked for guidance on cost assessments related to performing searches, especially related to the respondent's perceptions that such searches are of "little value." There were also several attorney respondents that made comments requesting more guidance on cost allocation in general.

(5.) Committee's Phase Two Recommendation as to Principle 2.05

Principle 2.05 appears to remain uncontroversial and effective in achieving some of its objectives, by encouraging parties to discuss search methodologies prior to beginning discovery. The Committee recommends no changes to Principle 2.05. The Committee might wish to consider further guidance related to whether costs should be a factor considered when discussing and developing search methodologies.

I. Principle 2.06 (Production Format)

(NOTE: Principle 2.06 was modified after Phase One, and therefore, the version set forth below shows the modifications that were made.)

(a) At the Rule 26(f) conference, counsel ~~or~~and the parties should make a good faith effort to agree on the format(s) for production of ESI (whether native or some other reasonably usable form). If counsel or the parties are unable to resolve a production format issue, then the issue should be raised promptly with the Court.

(b) The parties should confer on whether ESI stored in a database or a database management system ~~often~~ can be produced by querying the database for discoverable information, resulting in a report or a reasonably usable and exportable electronic file for review by the requesting counsel or party.

(c) ESI and other tangible or hard copy documents that are not text-searchable need not be made text-searchable.

(d) Generally, the requesting party is responsible for the incremental cost of creating its copy of requested information. Counsel or the parties are encouraged to discuss cost sharing for optical character recognition (OCR) or other upgrades of paper documents or non-text-searchable electronic images that may be contemplated by each party.

(1.) Committee's Reasoning for Principle 2.06

The Federal Rules of Civil Procedure provide guidance on production format. Principle 2.06(a) simply reinforces that guidance and encourages parties to begin discussing production format during the meet and confer process. The parties can certainly begin discussing production format for the usual file types, e.g., Microsoft Office Suite file types, and raise any disputes with the court at the initial Rule 16 hearing. Other file types may arise only as discovery progresses, and any production format issues with respect to those file types should be raised promptly.

Principle 2.06(b) addresses databases, particularly enterprise databases that tend to be highly specialized and often customized. Producing such a database in "native" form presents more complex issues than producing an Excel spreadsheet in native form. Building an identical database generally is not realistic. Placing the raw data points into some other database built by the requesting party raises complex issues, including authenticity of any reports the requesting party ultimately generates. The Committee does not intend to rule out the possibility that "native" production may sometimes be appropriate. But the Committee hopes to encourage litigants to pause and consider whether they really want or need "native" production when the producing party already has a functioning database that can generate reports of the relevant data in various electronic forms, often including Excel or Access.

Principle 2.06(c) addresses the production format for documents and ESI that are not text searchable in their "native" form, e.g., paper documents and image files such as TIFFs and many PDFs. To the extent that production format is addressed in the Federal Rules of Civil Procedure, the focus is on the problem of a producing party downgrading the format of the files by making them less usable and searchable. The Committee sought to provide guidance on the converse issue of upgrading the format of documents and ESI to make them more usable and searchable. Paper documents and non-searchable ESI commonly are scanned with optical character recognition ("OCR") software that identifies text and creates searchable text fields that can be associated with the images in a database. Case law has varied on whether such upgrades must be provided and on

who should pay for such upgrades. Principle 2.06(c) takes the view that the producing party cannot be required to upgrade non-text searchable documents or pay for such upgrades, any more than it should be permitted to downgrade text searchable ESI.

Principle 2.06(d) addresses allocation of production costs and encourages cooperation on upgrades that both parties would otherwise pay to do separately. First, Principle 2.06(d) makes clear that a requesting party is responsible for paying the incremental cost of its copy of a production. This is the result of applying the Federal Rules of Civil Procedures, which require a producing party not to produce copies but to make the production documents and ESI available for inspection and copying. Second, Principle 2.06(d) encourages parties to discuss sharing costs for upgrades of non-searchable documents. If both parties intend to upgrade documents, the spirit of cooperation required by Federal Rule of Civil Procedure 1 suggests that the parties ought to pay to accomplish this once together rather than twice separately.

(2.) Phase One Survey Results on Principle 2.06

It is not clear yet how effective Principle 2.06 is in encouraging early discussion of the format for producing ESI. Only about half of the attorney respondents indicated that the parties discussed production format before commencing discovery. (App. F.1.b. at 27.) It is also unclear so far what effect the cost allocation aspects of Principle 2.06 are having.

(3.) Committee's Phase One Recommendation on Principle 2.06

It is too early to draw conclusions about Principle 2.06. This Principle should be further tested in Phase Two.

(4.) Phase Two Survey Results on Principle 2.06

The Phase Two survey asked the attorneys if the parties discussed format(s) of production prior to commencing discovery. While in Phase One forty-nine percent (49%) of respondents responded yes to this question, in Phase Two that number dropped slightly to thirty-nine percent (39%). (Table A-13.) The cost allocation provisions of Principle 2.06 were mentioned favorably by some attorney respondents. There were also several respondents that requested more general guidance regarding cost shifting as a method to fairly contain discovery costs and the scope of discovery requests. Some of these respondents suggested costs should be shifted more to the requesting party.

(5.) Committee's Phase Two Recommendation as to Principle 2.06

Principle 2.06 appears to remain uncontroversial and effective achieving some of its objectives, by encouraging parties to discuss format of production prior to beginning discovery. The Committee recommends no changes to Principle 2.06. However, in light of the number of attorney comments specific to cost shifting or allocation, the Committee might want to consider expanding its discussion of cost allocation within or even beyond Principle 2.06.

J. Principle 3.01 (Judicial Expectations of Counsel)

Because discovery of ESI is being sought more frequently in civil litigation and the production and review of ESI can involve greater expense than discovery of paper documents, it is in the interest of justice that all judges, counsel and parties to litigation become familiar with the fundamentals of discovery of ESI. It is expected by the judges adopting these Principles that all counsel will have done the following in connection with each litigation matter in which they file an appearance:

(1) Familiarize themselves with the electronic discovery provisions of the Federal Rules of Civil Procedure, including Rules 26, 33, 34, 37, and 45, as well as any applicable State Rules of Procedure;

(2) Familiarize themselves with the Advisory Committee Report on the 2006 Amendments to the Federal Rules of Civil Procedure, available at http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf; and

(3) Familiarize themselves with these Principles.

(1.) Committee's Reasoning for Principle 3.01

As Principle 3.01 expressly states, the Committee believed that many attorneys would do well to better understand the fundamentals of electronic discovery. Principle 3.01 makes clear that attorneys in the Pilot Program should familiarize themselves with the basic rules that apply in this area.

(2.) Phase One Survey Results on Principle 3.01

The survey responses do not provide data on Principle 3.01.

(3.) Committee's Phase One Recommendation on Principle 3.01

It is too early to draw conclusions about Principle 3.01, although its guidance seems self evident and indisputable. This Principle should be further tested in Phase Two.

(4.) Phase Two Survey Results on Principle 3.01

Educational materials described in Principle 3.01 have been posted on Pilot Program's web site, www.DiscoveryPilot.com, and are updated regularly so judges and practitioners have a source for reliable and objective educational information.

Although the E-filer Baseline Survey results (App. F.2.b.) showed a marked improvement from August 2010 to March 2012 in the respondents' knowledge about e-discovery, its concomitant issues, and the Pilot Program as well as the educational information it provides, more education is need for both lawyers and judges.

(5.) Committee's Phase Two Recommendation as to Principle 3.01

The Pilot Program remains committed to providing high quality programs at no charge and on demand at www.DiscoveryPilot.com.

K. Principle 3.02 (Duty of Continuing Education)

> *Judges, attorneys and parties to litigation should continue to educate themselves on electronic discovery by consulting applicable case law, pertinent statutes, the Federal Rules of Civil Procedure, the Federal Rules of Evidence, The Sedona Conference® publications relating to electronic discovery[1], additional materials available on web sites of the courts[2], and of other organizations[3] providing educational information regarding the discovery of ESI.[4]*

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[1] http://www.thesedonaconference.org/content/miscFiles/publications_html?grp=wgs110

[2] E.g. http://www.ilnd.uscourts.gov/home/

[3] E.g. http://www.7thcircuitbar.org, www.fjc.gov (under Educational Programs and Materials)

[4] E.g. http://www.du.edu/legalinstitute

(1.) Committee's Reasoning for Principle 3.02

Like Principle 3.01, Principle 3.02 is meant to encourage attorneys to better understand the fundamentals of electronic discovery. Principle 3.02 points attorneys to useful resources on matters of electronic discovery.

(2.) Phase One Survey Results on Principle 3.02

The survey responses do not provide data on Principle 3.02.

(3.) Committee's Phase One Recommendation as to Principle 3.02

It is too early to draw conclusions about Principle 3.02, although its guidance seems uncontroversial. This Principle should be tested further in Phase Two, which will hopefully provide more comprehensive data for evaluation.

(4.) Phase Two Survey Results on Principle 3.02

The Phase Two survey posed several questions regarding the Pilot Program's web site, webinars, resources, and educational programs. The results show that a significant number of attorneys have used and benefitted from these resources. Thirty-five percent (35%) of respondents were aware of the Pilot Program's web site (Table E-21) and eighteen percent (18%) reported that they had visited that web site. (Table E-22.) Thirty percent (30%) of respondents were aware that the Program has sponsored a series of webinars and that copies are available on the web site (Table E-23); thirteen percent (13%) reported that they had viewed or listened to a Program webinar. (Table E-24.) Seven percent (7%) of respondents reported that they had used the case law and other resources available on the Program's web site. (Table E-25.) A full eleven percent (11%) of respondents reported that they had participated in an educational program offered by the Program. (Table E-26.) Furthermore, in response to the question: "What aspects of the Pilot Program are the most useful?" one judge responded, "The educational programs that are offered free to the lawyers and the judges."

The educational work of the Committee is not complete, however, since several lawyers who responded to the survey indicated that the Pilot Program could be improved by providing more education. According to one lawyer: "Before the Pilot Program will help, attorneys continue to need more technical education to better understand ESI. Judges, too, rely too much on the parties and continue to need more ESI education on the technical abilities, limitations and practical ways to review or search ESI."

(5.) Committee's Phase Two Recommendation on Principle 3.02

Principle 3.02 advises judges and lawyers alike to continue to be educated about the complex and fast-changing issues surrounding ESI. This guidance is as important now as it was when the Principles were first developed. The Pilot Program has had an impact. In addition to the survey results noted above, data gathered outside of the Phase Two survey also supports the finding that a significant number of attorneys have used and are accessing the resources made available through the web site. To date, Discoverypilot.com has been accessed from over eight hundred (800) locations across the United States, and by foreign users in locations including India, Canada, the United Kingdom, and Mexico. In total the site has been accessed from sixty (60) countries.

The Education Subcommittee remains committed to providing free education to the bar about handling electronic discovery and fulfilling their legal obligations. The Subcommittee conceived, organized and produced several educational opportunities during Phase Two. For example, in November 2011 the Education Subcommittee, in conjunction with Wilson Elser, presented a free webinar entitled "The Ethics of E-Discovery" for which over two thousand seven hundred (2,700) people registered. In March of 2012, in cooperation with McAndrews Held & Malloy, LTD, the Subcommittee presented "ESI 101" attended by over one thousand (1,000) lawyers from Illinois and Wisconsin.

As the Phase Two survey results make clear, the Committee must expand its outreach efforts to raise awareness of the existence of the web site, www.DiscoveryPilot.com, as well as the variety and depth of resources it can provide to the legal community. We will continue to post our educational programs on the web site for future viewing and update the pertinent caselaw. Additionally, and in furtherance of one of Principle 3.02's specific goals, the Pilot Program will continue to partner with The Sedona Conference® to make selected Sedona Conference® materials available on our web site.

10. PHASE THREE COMMENCES MAY 2012

As we proceed from Phase Two to Phase Three of the Pilot Program, the Committee wishes to acknowledge all of the work of all of the people involved, and invites anyone who is interested to join us in our endeavor.

The Committee seeks to have discovery procedures implemented so that each civil case filed in the United States District Courts is administered in as "just, speedy, and inexpensive" (F.R.C.P. 1) manner as possible. Through the efforts of all the participants in the Seventh Circuit Electronic Discovery Pilot Program, we are striving, and will continue striving, to reach the goal of providing justice to all parties while minimizing the cost and burden of discovery in litigation in the United States.

The Committee continues to seek to expand interest in improving the e-discovery process across the country and internationally. Advancing the e-discovery information available on our Web site, www.DiscoveryPilot.com, continues to be a priority. Also, education continues to be a primary goal of the Pilot Program. The Committee has a number of new webinars planned for Phase Three and is considering others. The Committee is considering new subcommittees to focus on specific needs of those seeking e-discovery and those providing it in the litigation process. Cutting costs, improving efficiency, and providing fairness to all parties continues to be area in which the Committee has great interest in the civil litigation e-discovery process as well as in criminal litigation. Phase Three will see new developments in these areas.

In addition, during Phase Three, the newly created E-Mediation Subcommittee will continue its work to explore the creation of a program to provide free mediation of electronic discovery disputes in cases pending in the District. Our goal is to establish a panel of experienced electronic discovery practitioners who will volunteer to mediate discovery disputes involving electronic discovery at no cost to the parties. Panel members would receive training in mediation techniques. The Committee views an E-Mediation Program as a logical extension of the Committee's robust education program. It is hoped that volunteer mediators would be able to contribute their formidable technical and legal expertise to help parties reach common ground and avoid expensive and time-consuming motion practice. The Committee believes that a well-designed E-Mediation Program furthers the Pilot Program's first Principle: to achieve the goals of Federal Rule of Civil Procedure 1 to secure the just, speedy and inexpensive determination of civil cases through the early resolution of electronic discovery disputes without Court intervention.

The Committee remains open to suggestions and welcomes feedback. You may reach the Committee through DiscoveryPilot@ilnd.uscourts.gov.

11. APPENDIX

ALL DOCUMENTS LISTED IN THIS APPENDIX
ARE AVAILABLE FOR REVIEW AND DOWNLOAD
ON THE ON-LINE VERSION OF THIS REPORT
LOCATED AT WWW.DISCOVERYPILOT.COM.

A. The Standing Order Implementing the Principles Used in Phase Two

B. Committee's Phase One and Phase Two Meeting Agendas and Minutes
   1. May 20, 2009
   2. June 24, 2009
   3. August 26, 2009
   4. September 16, 2009
   5. January 27, 2010
   6. April 20, 2010
   7. June 16, 2010
   8. July 28, 2010
   9. November 3, 2010
   10. January 12, 2011
   11. March 9, 2011
   12. April 27, 2011
   13. September 21, 2011
   14. December 7, 2011
   15. March 1, 2012
   16. April 25, 2012

C. DiscoveryPilot.com Web site (April 30, 2012)

D. Education Programs — Webinars and Live Seminars
   1. February 17, 2010 – "Re-forming Discovery: The Seventh Circuit E-Discovery Pilot Program"
   2. April 28, 2010 – "You and Your Client: Communicating about E-Discovery"
   3. April 6, 2011 and May 17, 2011 – "What Everyone Should Know About the Mechanics of E-Discovery"
   4. November 30, 2011 – "The Ethics of E-Discovery"

5. March 28, 2012 – "ESI 101"
6. January 18, 2011, October 18, 2011, and April 18, 2012 – E-Discovery Expert Attorney Jonathan Redgrave presented "The 4 P's of Electronic Discovery: Preservation, Proportionality, Privilege, and Privacy"
7. February 28, 2011 and April 11, 2011 – "The Seventh Circuit E-Discovery Pilot Program: Principles and Practical Applications"
8. September 8, 2011 – "Mock Rule 16 Meet and Confer"

E. Surveys Administered
   1. Phase One
      a. Judge Survey E-mail and Questionnaire
      b. Attorney Survey E-mail and Questionnaire
   2. Phase Two
      a. Judge Survey E-mail and Questionnaire
      b. Attorney Survey E-mail and Questionnaire
      c. August 2010 E-filer Baseline Survey E-mail and Questionnaire
      d. March 2012 E-filer Baseline Survey E-mail and Questionnaire

F. Survey Data Results
   1. Phase One
      a. Judge Survey
      b. Attorney Survey
   2. Phase Two
      a. Judge and Attorneys Surveys
      b. Baseline Survey

G. Media Coverage

A. The Standing Order Implementing the Principles Used in Phase Two

(Rev. 08-01-10)

UNITED STATES [DISTRICT/BANKRUPTCY] COURT
FOR THE _____ DISTRICT OF _____
_____ DIVISION

_____,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. _____**
	)	
_____,	)	**Judge _____**
	)	
Defendant.	)	

[PROPOSED]
STANDING ORDER RELATING TO THE
DISCOVERY OF ELECTRONICALLY STORED INFORMATION

This court is participating in the Pilot Program initiated by the Seventh Circuit Electronic Discovery Committee. Parties and counsel in the Pilot Program with civil cases pending in this Court shall familiarize themselves with, and comport themselves consistent with, that committee's Principles Relating to the Discovery of Electronically Stored Information. For more information about the Pilot Program please see the web site of The Seventh Circuit Bar Association, www.7thcircuitbar.org. If any party believes that there is good cause why a particular case should be exempted, in whole or in part, from the Principles Relating to the Discovery of Electronically Stored Information, then that party may raise such reason with the Court.

General Principles

Principle 1.01 (Purpose)

The purpose of these Principles is to assist courts in the administration of Federal Rule of Civil Procedure 1, to secure the just, speedy, and inexpensive determination of every civil case, and to promote, whenever possible, the early resolution of disputes regarding the discovery of electronically stored information ("ESI") without Court intervention. Understanding of the feasibility, reasonableness, costs, and benefits of various aspects of electronic discovery will inevitably evolve as judges, attorneys and parties to litigation gain more experience with ESI and as technology advances.

Principle 1.02 (Cooperation)

An attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

Principle 1.03 (Discovery Proportionality)

The proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C) should be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable.

Early Case Assessment Principles

Principle 2.01 (Duty to Meet and Confer on Discovery and to Identify Disputes for Early Resolution)

(a) Prior to the initial status conference with the Court, counsel shall meet and discuss the application of the discovery process set forth in the Federal Rules of Civil Procedure and these Principles to their specific case. Among the issues to be discussed are:

(1) the identification of relevant and discoverable ESI and documents, including methods for identifying an initial subset of sources of ESI and documents that are most likely to contain the relevant and discoverable information as well as methodologies for culling the relevant and discoverable ESI and documents from that initial subset (see Principle 2.05);

(2) the scope of discoverable ESI and documents to be preserved by the parties;

(3) the formats for preservation and production of ESI and documents;

(4) the potential for conducting discovery in phases or stages as a method for reducing costs and burden; and

(5) the potential need for a protective order and any procedures to which the parties might agree for handling inadvertent production of privileged information and other privilege waiver issues pursuant to Rule 502(d) or (e) of the Federal Rules of Evidence.

(b) Disputes regarding ESI that counsel for the parties are unable to resolve shall be presented to the Court at the initial status conference, Fed. R. Civ. P. Rule 16(b) Scheduling Conference, or as soon as possible thereafter.

(c) The attorneys for each party shall review and understand how their client's data is stored and retrieved before the meet and confer discussions in order to determine what issues must be addressed during the meet and confer discussions.

(d) If the Court determines that any counsel or party in a case has failed to cooperate and participate in good faith in the meet and confer process or is impeding the purpose of these Principles, the Court may require additional discussions prior to the commencement of discovery, and may impose sanctions, if appropriate.

Principle 2.02 (E-Discovery Liaison(s))

In most cases, the meet and confer process will be aided by participation of an e-discovery liaison(s) as defined in this Principle. In the event of a dispute concerning the preservation or production of ESI, each party shall designate an individual(s) to act as e-discovery liaison(s) for purposes of meeting, conferring, and attending court hearings on the subject. Regardless of whether the e-discovery liaison(s) is an attorney (in-house or outside counsel), a third party consultant, or an employee of the party, the e-discovery liaison(s) must:

(a) be prepared to participate in e-discovery dispute resolution;

(b) be knowledgeable about the party's e-discovery efforts;

(c) be, or have reasonable access to those who are, familiar with the party's electronic systems and capabilities in order to explain those systems and answer relevant questions; and

(d) be, or have reasonable access to those who are, knowledgeable about the technical aspects of e-discovery, including electronic document storage, organization, and format issues, and relevant information retrieval technology, including search methodology.

Principle 2.03 (Preservation Requests and Orders)

(a) Appropriate preservation requests and preservation orders further the goals of these Principles. Vague and overly broad preservation requests do not further the goals of these Principles and are therefore disfavored. Vague and overly broad preservation orders should not be sought or entered. The information sought to be preserved through the use of a preservation letter request or order should be reasonable in scope and mindful of the factors set forth in Rule 26(b)(2)(C).

(b) To the extent counsel or a party requests preservation of ESI through the use of a preservation letter, such requests should attempt to ensure the preservation of relevant and discoverable information and to facilitate cooperation between requesting and receiving counsel and parties by transmitting specific and useful information. Examples of such specific and useful information include, but are not limited to:

(1) names of the parties;

(2) factual background of the potential legal claim(s) and identification of potential cause(s) of action;

(3) names of potential witnesses and other people reasonably anticipated to have relevant evidence;

(4) relevant time period; and

(5) other information that may assist the responding party in assessing what information to preserve.

(c) If the recipient of a preservation request chooses to respond, that response should provide the requesting counsel or party with useful information regarding the preservation efforts undertaken by the responding party. Examples of such useful and specific information include, but are not limited to, information that:

(1) identifies what information the responding party is willing to preserve and the steps being taken in response to the preservation letter;

(2) identifies any disagreement(s) with the request to preserve; and

(3) identifies any further preservation issues that were not raised.

(d) Nothing in these Principles shall be construed as requiring the sending of a preservation request or requiring the sending of a response to such a request.

Principle 2.04 (Scope of Preservation)

(a) Every party to litigation and its counsel are responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control. Determining which steps are reasonable and proportionate in particular litigation is a fact specific inquiry that will vary from case to case. The parties and counsel should address preservation issues at the outset of a case, and should continue to address them as the case progresses and their understanding of the issues and the facts improves.

(b) Discovery concerning the preservation and collection efforts of another party may be appropriate but, if used unadvisedly, can also contribute to the unnecessary expense and delay and may inappropriately implicate work product and attorney-client privileged matter. Accordingly, prior to initiating such discovery a party shall confer with the party from whom the information is sought concerning: (i) the specific need for such discovery, including its relevance to issues likely to arise in the litigation; and (ii) the suitability of alternative means for obtaining the information. Nothing herein exempts deponents on merits issues from answering questions concerning the preservation and collection of their documents, ESI, and tangible things.

(c) The parties and counsel should come to the meet and confer conference prepared to discuss the claims and defenses in the case including specific issues, time frame, potential damages, and targeted discovery that each anticipates requesting. In addition, the parties and counsel should be prepared to discuss reasonably foreseeable preservation issues that relate directly to the information that the other party is seeking. The parties and counsel need not raise every conceivable issue that may arise concerning their preservation efforts; however, the identification of any such preservation issues should be specific.

(d) The following categories of ESI generally are not discoverable in most cases, and if any party intends to request the preservation or production of these categories, then that intention should be discussed at the meet and confer or as soon thereafter as practicable:

(1) "deleted," "slack," "fragmented," or "unallocated" data on hard drives;

(2) random access memory (RAM) or other ephemeral data;

(3) on-line access data such as temporary internet files, history, cache, cookies, etc.;

(4) data in metadata fields that are frequently updated automatically, such as last-opened dates;

(5) backup data that is substantially duplicative of data that is more accessible elsewhere; and

(6) other forms of ESI whose preservation requires extraordinary affirmative measures that are not utilized in the ordinary course of business.

(e) If there is a dispute concerning the scope of a party's preservation efforts, the parties or their counsel must meet and confer and fully explain their reasons for believing that additional efforts are, or are not, reasonable and proportionate, pursuant to Rule 26(b)(2)(C). If the parties are unable to resolve a preservation issue, then the issue should be raised promptly with the Court.

Principle 2.05 (Identification of Electronically Stored Information)

(a) At the Rule 26(f) conference or as soon thereafter as possible, counsel or the parties shall discuss potential methodologies for identifying ESI for production.

(b) Topics for discussion may include, but are not limited to, any plans to:

(1) eliminate duplicative ESI and whether such elimination will occur only within each particular custodian's data set or whether it will occur across all custodians;

(2) filter data based on file type, date ranges, sender, receiver, custodian, search terms, or other similar parameters; and

(3) use keyword searching, mathematical or thesaurus-based topic or concept clustering, or other advanced culling technologies.

Principle 2.06 (Production Format)

(a) At the Rule 26(f) conference, counsel and the parties should make a good faith effort to agree on the format(s) for production of ESI (whether native or some other reasonably usable form). If counsel or the parties are unable to resolve a production format issue, then the issue should be raised promptly with the Court.

(b) The parties should confer on whether ESI stored in a database or a database management system can be produced by querying the database for discoverable information,

resulting in a report or a reasonably usable and exportable electronic file for review by the requesting counsel or party.

(c) ESI and other tangible or hard copy documents that are not text-searchable need not be made text-searchable.

(d) Generally, the requesting party is responsible for the incremental cost of creating its copy of requested information. Counsel or the parties are encouraged to discuss cost sharing for optical character recognition (OCR) or other upgrades of paper documents or non-text-searchable electronic images that may be contemplated by each party.

Education Provisions

Principle 3.01 (Judicial Expectations of Counsel)

Because discovery of ESI is being sought more frequently in civil litigation and the production and review of ESI can involve greater expense than discovery of paper documents, it is in the interest of justice that all judges, counsel and parties to litigation become familiar with the fundamentals of discovery of ESI. It is expected by the judges adopting these Principles that all counsel will have done the following in connection with each litigation matter in which they file an appearance:

(1) Familiarize themselves with the electronic discovery provisions of Federal Rules of Civil Procedure, including Rules 26, 33, 34, 37, and 45, as well as any applicable State Rules of Procedure;

(2) Familiarize themselves with the Advisory Committee Report on the 2006 Amendments to the Federal Rules of Civil Procedure, available at http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf; and

(3) Familiarize themselves with these Principles.

Principle 3.02 (Duty of Continuing Education)

Judges, attorneys and parties to litigation should continue to educate themselves on electronic discovery by consulting applicable case law, pertinent statutes, the Federal Rules of Civil Procedure, the Federal Rules of Evidence, The Sedona Conference® publications relating

to electronic discovery[1], additional materials available on web sites of the courts[2], and of other organizations[3] providing educational information regarding the discovery of ESI.[4]

ENTER:

Dated: _____

_____
[Name]
United States [District/Bankruptcy/
Magistrate] Judge

[1] http://www.thesedonaconference.org/content/miscFiles/publications_html?grp=wgs110
[2] E.g. http://www.ilnd.uscourts.gov/home/
[3] E.g. http://www.7thcircuitbar.org, www.fjc.gov (under Educational Programs and Materials)
[4] E.g. http://www.du.edu/legalinstitute

B. Committee's Phase One and Phase Two Meeting Agendas and Minutes

1. May 20, 2009

District Court Electronic Discovery Committee

Summary of May 20, 2009 meeting.

1. Introduction.

   a. The members of the committee introduced themselves. See attached contact list.

   b. Judge Holderman and Judge Nolan discussed why the committee was formed and some of their goals for the committee. The committee was formed to consider what can be done to reduce the costs of electronic discovery, and the costs of discovery and litigation more generally. The committee work product should include: (1) draft procedures, best practices, and or guidelines designed to address some of the root causes of the problem and help address the problem; and (2) creation of mechanisms for measuring whether those procedures, best practices, and guidelines are in fact helping to address the problem. One goal of the process is to come up with an approach that clients and lawyers believe in. Perceptions are important on these issues.

   c. Judge Holderman and Judge Nolan identified a number of related resources, materials, and projects that may be helpful to the committee, including:

      i. The Sedona Conference Cooperation Proclamation dated July 2008. *See* Judge Nolan's page on the Northern District website. As of yesterday, all 10 Magistrate judges in this district have adopted the proclamation. Under the document, parties are required to sit down and talk about issues and reach agreements if possible. Parties should make serious efforts to reach agreement before going to the Court on any issue.
      ii. The American College of Trial Lawyers recently completed a survey addressing, among other things, electronic discovery issues. Committee member Robert Byman was involved.
      iii. Several other committees are studying this issue. Judge Holderman invited members of those committees to participate in, and coordinate with, this committee. Those other committees include:
         (1) A special committee of the 7th Circuit Bar Association is currently studying this same issue. That committee has targeted May 2010 as the date for finalizing a report or recommendation on the issue. The hope is that the this committee can coordinate with that committee to possibly come up with joint recommendations.
         (2) The ISBA Civil Practice and Procedure Section Council is also studying this issue. The liaisons from that committee are Tim Chorvat and Shawn Wood.
      iv. The Judicial Conference is meeting in North Carolina in May 2010 to address a variety of issues. This committee hopes to have something to discuss or

present at that conference. Ken Withers stated that he would attempt to get a representative of this committee included at Sedona's May 2010 conference.

2. Additional committee members. Judge Holderman asked the committee members to consider possible additional members, in at least two areas:

   a. Academia

      i. Henry Butler, Northwestern Law School.
      ii. Mary Nagel at John Marshall.
      iii. Other suggestions.
      iv. Certain committee members volunteered to contact.

   b. In house counsel.

      i. ??? Ideas?
      ii. Certain committee members volunteered to follow up.

   c. Judge Holderman also asked committee members to consider other additions to the committee. Some committee members suggested other possible members.

3. Conclusions and the formation of subcommittees. At the conclusion of the meeting, after a discussion of various issues as summarized in point 4 below, the committee formed 3 subcommittees. Each subcommittee was directed to solve a discrete issue and report back to the full committee. "Solve the issue" means both (a) offering concrete proposals to address the problem and (b) recommending a method for measuring whether those proposals work. The three subcommittees are:

   a. Preservation Letter Subcommittee.

      i. This subcommittee should address, among other things, what should be included in preservation letters, the obligations of attorneys sending and receiving those letters, possible meet and confer requirements with respect to such letters, and how these obligations can best be communicated and enforced.
      ii. Committee
         (1) Chair: Jim Montana.
         (2) Other members: Tom Lidbury, Ron Lipinski, Michael Kanovitz, Marie Halpin.

   b. Education Subcommittee.

i. This subcommittee should address methods for ensuring that lawyers litigating cases in federal court have some baseline knowledge regarding e-discovery issues. The education could relate to a number of issues, including the basics of electronically stored information; the costs of various forms of discovery, and budgeting, proportionality, and marginal utility concepts; and sampling, statistics, and keyword searching.

ii. Committee
   (1) Co-Chairs: Mary Roland and Kate Kelly.
   (2) Other members: Natalie Spears, Tim Chorvat, Shawn Wood.

c. Early Discovery Assessment and Discovery Plan Subcommittee

i. This subcommittee should address ways to ensure that parties meet early in the case to discuss a variety of issues relating to electronic discovery and the costs of discovery, including budgeting, proportionality, opportunities for staged discovery, periodic assessments of discovery plans, and the best way to exchange information regarding electronic systems.

ii. Committee:
   (1) Chair: Karen Quirk
   (2) Other committee members: Marie Halpern, Arthur Gollwitzer, Tom Staunton.

d. The subcommittees were asked to keep in mind that these issues and any proposed solutions may spill over to all pretrial discovery, and to cases outside the Northern District of Illinois and the Seventh Circuit.

e. The subcommittees were also asked to consider Ken Withers as a resource. They were also asked to consider reviewing, with Judge Nolan's assistance, the working group website of the Sedona Conference, which has structured guidance on some of these issues and examples.

4. These subcommittees were formed after an extended discussion, led by Ken Withers, on a number of issues relating to electronic discovery and the costs of electronic discovery:

a. Why is the problem of e-discovery different from the problem of paper discovery? There are differences of both degree and kind.

i. Degree – the main difference is volume. The volume for e-discovery is astronomical. 1 GB of electronically stored information translates into 60 million pieces of paper. Even in the routine case, there is no way for attorneys to cull/review/produce all of the information using current views of relevance.

ii. Kind. With e-discovery, you also have to deal with the complexity of the systems from which information is derived. Paper was paper. But now,

systems are so complex that even in a small business, one person can't give you a complete picture of where everything is. This raises a number of issues, including:

(1) Hidden information.
   (a) Metadata
   (b) Electronic systems generate information we do not see. Some of that information can be crucial to a lawsuit, and it's information that is difficult to get to.
   (c) Electronic systems have hidden processes that people do not think of when creating documents or doing business. One of those hidden processes is the automatic deletion function of most systems.
   (d) Legacy systems and legacy data raise additional issues.

(2) New media. People are constantly coming up with new ways to communicate and store information. For example, Twitter did not exist 18 months ago.

(3) Third parties. Much of the information that could be relevant in a lawsuit is held by third parties rather than the parties themselves. More and more businesses depend on third parties to manage and store their info.

(4) These are all reasons why digital is different.

b. Recurring problems. There are a number of recurring problems that arise in connection with electronic discovery.

i. Preservation
   (1) Because of the large volumes of information, and the complexity of the systems used to store it, no one knows where everything is, which makes it very difficult to fashion a reasonable and cost-effective litigation hold.

ii. Defining the scope of discovery.
   (1) Forensic preservation – is it necessary?
   (2) What systems should we look at?
   (3) Proportionality ends up being the issue. Proportionality concepts have been part of the process since the 1993 amendments to the federal rules, but attorneys seem to ignore them.

iii. Cost of document review
   (1) Ken Withers stated that there are estimates that 80 cents of every dollar spent in litigation is spent on document review.
   (2) Attorney review is not possible in the way we thought about it in the past. We must come up with better ways to reduce or streamline attorney review.

iv. Form of production.

(1) Unlike paper, electronic discovery can take many different forms. Each form presents different aspects of the information. Different forms can be useful (and not useful) in different ways. We have to decide what form is most useful and cost-effective.

v. Spoliation and spoliation threat.

c. How have the rules addressed these recurring issues?

i. Preservation. The rules cannot address preservation. Instead, the common law dictates. But you could have procedures that require parties to discuss and come to agreement as early as possible, and thus foreclose later threats of spoliation.

ii. Accessibility. Can't always press a button to access.
(1) Databases, backup tapes
(2) Rules set up as 2 tier
(a) Readily accessible first.
(b) Inaccessible may only be obtained later, after a showing of necessity.

iii. 26(f) conference.
(1) If parties meet and confer re scope of discovery before discovery commences (rather than simply firing out discovery), they can frame an intelligent discovery plan.

iv. 26(b)(5). Clawback
(1) Helps reduce the cost of document review.
(2) Still have to use best efforts, but if do that, have right to claw back, and will not be deemed to have waived privilege.

v. Rule 502 is the substantive counterpart. It federalizes the law of inadvertent production.
(1) eliminates subject matter waiver
(2) provides protection for other cases
(3) establishes reasonableness test.
(4) allows parties to enter into agreements.
(5) allows courts to enter orders enforceable against all other parties.
(6) purpose is to allow use of tools to make privilege review as efficient as possible.

vi. Rule 37(e) and limitations on sanctions powers. Parties will not be sanctioned if the loss is due to routine good faith operation of an electronic record system. This is an attempt to inject some proportionality into sanctions questions.

d. Other issues.

i. The rules require attorneys to meet and confer and make agreements that forestall future disputes.

(1) But the rules can only go so far. Courts can also take steps to encourage cooperation, but cooperation cannot be legislated.

(2) Sedona has attempted to instill the idea that discovery should essentially be a nonadversarial process, essentially a cooperative process.

(3) Ken Withers – zealous advocacy is no longer part of the ethical rules. The Model Rules replaced it in 1983 with a duty of diligent representation.

(4) The Sedona conference and federal judicial center have drafted a 3-4 page document that describes the current problem, the potential conflict between zealous advocacy and cooperation.

(5) The Sedona proclamation is not simply a call to be nice to each other. The paper also offers ideas that can help implement cooperative behavior. Under game theory, competitors can only move forward through cooperative behavior.

(6) Sedona has been speaking to Judges, asking them what they can use to help promote cooperation.

(7) One of the recommendations has been education of the bar on e-discovery issues. The Judges they have asked believe that only a small percentage of lawyers understand the scope of the problem. So the question arises: could you implement something similar to CM/ECF education requirements before filing? Or some sort of requirement tied to trial bar certification? The idea would be an orientation and education in discovery management for all lawyers who are going to participate in a 26(f) conference.

(8) An alternative would be for Judges to require attendance by information technology staff at Rule 26 conferences. (Again, it is rare that one person would have knowledge of all systems, so this would likely have to be a point person). At least one judge in North Carolina has implemented an interesting set of requirements. In business cases, he requires that IT staff come to court, and he requires that the attorneys in the case certify that they have discussed budgeting for discovery. He requires the same certifications if they later seek an alteration of the discovery schedule.

ii. Education.

(1) When a lawyer does not really know what he or she needs or wants, there can be a knee jerk tendency to seek everything. This can happen both at the preservation stage and at the discovery stage. One party demands preservation or discovery of every single possible media or source.

(2) This issue seems less likely to arise in larger cases with large entities (and large electronic information systems) on both sides.

(3) In asymmetrical cases, this tends to be more of a problem. It can also result from a high level of distrust.

iii. Preservation letters

(1) Why not require that parties view the preservation letter as an invitation to meet and confer on these issues. In many cases, this could be broadened into a discussion about possible scope of discovery and preservation obligations.

(2) Could the committee draft best practices that might provide a safe harbor? Some districts have standing orders regarding electronic discovery, but this goes beyond that.

(3) Clients have an obligation to preserve that arises from common law. What if the committee could fashion reciprocal obligations for the seeker/requester sending the preservation letter, namely obligations to use the letter as a starting point for a discussion on preservation. Courts could ensure compliance later, after a lawsuit is filed, through their handling of spoliation and sanctions issues.

(4) This might be a way to take gamesmanship out of the preservation process.

(5) This would be a good thing for those receiving preservation letters. But it would also be good for those sending them. If we can improve the preservation process and reduce the risk of destruction of relevant information, requesting parties will have additional freedom to, and may be more willing to, use tools to make discovery more efficient and cost-effective, including tools such as staged discovery, and sampling.

(6) Ken Withers is not aware of any district courts that have best practices in this area.

(7) One of the goals of this process would be to reduce the costs of e-discovery, in terms of motion practice, time, delay, acrimony.

(8) Certain requirements exist today based on the common law. The question is what could the committee put together in terms of what should or must go in preservation letters, and what obligations requesting and responding parties should have with respect to those letters.

(a) On the responding party's side, perhaps the obligation would be to understand your systems well enough so you can start the discussion. Responders could have an obligation to send a letter back providing a brief description of their systems and a request to discuss what the requester really needs and what would be reasonable.

(b) In larger cases, this process could be aided after the case has been filed by a set of standard interrogatories. Judge Scheindlin has used them, they are posted and available. Perhaps the questions listed could be helpful at the pre-suit preservation stage as well.

(9) One problem from the responder's perspective. Once the case has been filed, to have a fully informed discussion on this, the responder may need more information than is required under notice pleading. Obviously, this would be an even greater problem pre-suit, when all the responder has is a preservation letter. Under those circumstances, it is difficult to make any informed judgments about potential witnesses, issues, and time frames. Could some of this information be required as part of the preservation letter?

iv. Motion practice.
   (1) The goal is to eliminate or significantly reduce motion practice.
   (2) One possibility is a rule that would state no motions without a joint status report from parties. Why is this motion being made, what was the last best position of the parties on the issue. This would be an extension of the current meet and confer requirement, which may not be strong enough.
   (3) Some of the committee members questioned whether it makes sense to legislate this. Parties are likely to include this information in their motion papers anyway, in an effort to explain the issue to the Judge and convince the Judge to rule their way.

v. As a general matter, asymmetrical cases raise concerns. What steps has a party taken to make sure costs aren't excessive.
   (1) Look at Judge Grimm's decision in Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354 (D. Md. 2008), which addresses proportionality.
   (2) The Court could require the parties to establish the marginal utility of discovery requests. The judge could telegraph this issue at the outset of the case.
   (3) Cost-shifting can also help encourage/ensure proportionality.
   (4) Among the plaintiffs' bar, there is so much distrust, and at times there is no knowledgeable plaintiff to help with what is available.
   (5) At a minimum, it would be helpful to require a meet and confer on these issues. Sampling might be another way to help make the system work more efficiently. Are there other steps?
   (6) Problem – in asymmetrical cases (and in other cases), the two sides may not want to cooperate.

vi. At times, the issues is a lack of knowledge. Education can assist with that. But on other occasions, the issue is one or both parties using discovery as a weapon. In order to protect against this, counsel needs to know that decisions will be made based on proportionality principles. In order to really understand what this means, lawyers need to be educated about what various steps may cost.

vii. Early case assessment, Rule 26(f).
   (1) The Magistrate Judges in the Northern District Illinois have collected statistics in all cases they have settled over the last 5 years. The

statistics show that the average settlement in a single plaintiff employment discrimination case is $40,000. This information may be helpful in making an early case assessment.

(2) Parties must address budgeting issues, transparency issues, cooperation.

(3) This concept could go beyond 26(f), to include a conference, possibly with the Judge in the case, to make decisions on these issues.

(4) This process works best when parties understand and use concepts of sampling, statistics, and marginal utility.

(5) Parties should keep in mind that keyword searching is not a substitute for cooperation. To work, keyword searching must be an iterative process, involving a significant amount of give and take. It's a negotiating process. In some cases, it can become a substitute for a document request.

5/20/09

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2. June 24, 2009

Seventh Circuit E-Discovery Pilot Program

June 24, 2009 Committee Meeting Agenda

1. Introduction
   A. Committee Members
   B. Subcommittee Assignments

2. Subcommittee Reports to Date
   A. Education Subcommittee
   B. Early Case Assessment Subcommittee
   C. Preservation Letter Subcommittee

3. July Objective – Develop Principles and Procedures for E-Discovery to be tested in the Seventh Circuit Trial Courts, Counsel, and Clients Regarding:
   A. E-Discovery Education
   B. E-Discovery Early Case Assessment
   C. E-Discovery Preservation
   D. E-Discovery Ethics and Economics

4. August Objective – Develop Survey Questionnaires: Pre-Discovery Questions and Post-Discovery Questions to Measure Perceived Effectiveness of Test Principles and Procedures

5. Short Term Goals and Timetable
   A. Next Full Committee Meeting, Wednesday, August 26, 2009, at 4:00 p.m. , Room 2541
      1. Finalize Principles and Procedures to be Tested
      2. Review Survey Questionnaires
         a. Pre-Discovery Questions for Counsel and for Clients
         b. Post-Discovery Questions for Counsel and for Clients
   B. Full Committee Meeting, Wednesday, September 16, 2009, at 4:00 p.m., Room 2541
      1. Finalize Survey Questionnaires
      2. Final Preparation for October 1, 2009 Implementation
   C. Implement Principles and Procedure with Questionnaires, October 1, 2009
   D. Tabulate and Analyze Questionnaire Responses, October 2009 through April 2010
   E. Publish Preliminary Report of Findings May 1, 2010
   F. Present Preliminary Report of Findings
      1. Seventh Circuit Bar Association Meeting
         InterContinental Hotel, Chicago, IL, May 2-4, 2010
      2. United States Court E-Discovery Conference
         Duke University, Durham, NC, May 10-11, 2010
6. Long Term Goals
   A. Continue to Implement Effective Principles and Procedures
   B. Cut the Litigation Costs of E-Discovery in the United States

Seventh Circuit E-Discovery Pilot Program
Minutes of June 24, 2009 Committee Meeting

Judges Present: Chief District Judge James F. Holderman; Magistrate Judge Nan R. Nolan.

Committee Members Present: Debra R. Bernard; Michael Bolton; Timothy J. Chorvat; Brian D. Fagel; Tiffany M. Ferguson; Jennifer W. Freeman; Arthur Gollwitzer III; Daniel T. Graham; Marie A. Halpin; Michael Kanovitz; Joshua Karsh; Kathryn A. Kelly; Linda Kelly; Pauline Levy; Thomas A. Lidbury; Ronald L. Lipinski; Joanne McMahon; James S. Montana; Joshua Nichols; Karen Quirk; Bruce A. Radke; Mary M. Rowland; Natalie J. Spears; Thomas M. Staunton; P. Shawn Wood.

1. Introduction. Judge Holderman made introductory remarks. Judge Holderman noted that he appreciates everyone's participation; he sees that Judge Nolan and the subcommittees are working diligently; and he is confident the committee will accomplish what we set out to do. Judge Holderman mentioned the Judge (Judge John G. Koeltl from the United States District Court for the Southern District of New York) who is putting together the program next May at Duke University. He hopes a representative of our committee can participate in that conference.
   A. Committee Members. The committee members introduced themselves.
   B. Subcommittee Assignments. Judge Holderman pointed out that the assignments are voluntary, and he encouraged and welcomed everyone's participation. He also raised the possibility of a drafting committee. He stated that he would draft members for that committee if and as necessary.

2. Subcommittee Reports to Date
   A. Education Subcommittee.
      1. The Education Subcommittee provided a written status report, which has been circulated to Committee Members. Mary Rowland and Kathryn Kelly also led a discussion on several issues the committee is attempting to address. The areas discussed include:
         a. Scope. In determining the issues to be addressed, the committee noted the need to collaborate with the Early Case Assessment Subcommittee.
         b. Counsel and the Court. The subcommittee has discussed the roles of counsel, the duties of counsel, and the role of Judges with respect to electronic discovery.
         c. Format. The subcommittee has discussed issues relating to how attorneys will be educated. One possibility is a webinar that would have separate chapters that could be updated and substituted out as necessary. Such an approach would lead to some cost questions – how would a webinar be funded?
         d. Topics. The subcommittee continues to work on possible topics to be covered as part of any webinar or education program or materials. In that regard, the subcommittee noted that it needs input from the other subcommittees.
         e. Judge Holderman stated that he believes a webinar placed directly on the District Court website and available for review at any time is an excellent idea. He also raised the possibility that District Court funds could be used for the project.

f. Judge Holderman also raised the possibility of live seminars run by the ISBA. Judge Holderman pointed out that if the Committee wishes to include anything for the ISBA's December meeting, we would need to provide materials to the ISBA by no later than July 15. Shawn Wood was asked whether the ISBA would be amenable to participating in this education effort, possibly in part by advertising at a live program the materials available in the webinar on the website.
g. Judge Holderman also encouraged the use of online forms. If the forms are approved by the Judges in the District, he can put them on the website.
h. Judge Holderman discussed how the work product of the subcommittees should be communicated to the bar. In addition to the webinar, he also discussed:
    (a) Written principles to be maintained on the District Court website. Judge Holderman has prepared samples of these that illustrate a possible form.
    (b) Principles and procedures that judges will adopt as standing orders.
i. Judge Nolan raised several issues.
    (a) One thing they're studying next year is cost savings – money and time. An educated bar would save a lot of time. She encouraged the subcommittees to incorporate cost savings concepts.
    (b) She liked Chris King's volunteer attorney mediation idea. It could be an effective way to reduce costs, and it's consistent with cooperation principles.
j. Judge Holderman stated that they might have to work on the mediator idea. He also pointed out that his comments and Judge Nolan's comments are just suggestions, not requirements.
k. Shawn Wood stated that he thought the mediator idea would be a good idea. Mediators could provide additional education during mediation break out sessions.
l. Mary Rowland raised one issue with respect to the mediator issue. She generally represents plaintiffs, and she suspects the volunteer mediators, if they were attorneys, would come from large law firms working primarily for defendants. She is concerned that some members of the plaintiffs' bar might not see the mediators as neutral.
m. There was a brief discussion about whether to make any education mandatory, as part of the trial bar process. Concerns were raised about the large number of people involved, which could add costs and require instructors.
    (a) Other alternatives were discussed, including a certification at the end of the webinar or some form of self-reporting, similar to the process for MCLE.
    (b) Judge Holderman suggested that this could be incorporated into the "Seventh Circuit Principles for Litigation Involving the Discovery of Electronically Stored Information" to be maintained on the District Court website. Attorneys could be required to certify whether they've completed the webinar, whether they've reviewed the forms on the website, and whether they have knowledge regarding their clients systems.

2. The next meeting of the Education Subcommittee will be July 7 at noon. The meeting will be in person, but phone participation will be permitted as well.

B. Early Case Assessment Subcommittee

1. The Early Case Assessment Subcommittee submitted a written status report, which has been circulated to Committee Members. Karen Quirk provided an oral summary of the subcommittee's work to date and led a discussion on several issues.
2. General and form of work product. The subcommittee has met 3 times. At those meetings, the subcommittee reviewed and discussed its charge; reviewed local rules from other jurisdictions, and the new Circuit Court of Cook County standing order on electronic discovery, and discussed what they liked and didn't like about those other approaches. The subcommittee also discussed what form its work product should take – standing order or local rule. It also exchanged some preliminary drafts, but it is not yet prepared to submit a draft to the larger Committee.
    a. Judge Holderman stated that he is anticipating that the work of the committee would be implemented through standing orders for use by Judges who wish to participate. Local rules are cumbersome and difficult to pass.
3. Testing. The subcommittee has had some initial discussions on the testing issue, but it has not made significant progress on that issue.
4. Judge Holderman stated that Jennifer Freeman has agreed to provide Kroll Ontrak's assistance on that issue.
5. Default rules. The subcommittee asked for the larger Committee's thoughts re whether it would be useful to incorporate default rules into the early case assessment standing order.
    a. Judge Holderman stated that he believes judges generally like default rules. They permit everyone involved to know what the rule will be if you cannot agree.
    b. Judge Nolan asked whether it makes sense to include defaults or simply focus on cooperation. If the defaults are simple – not long, like the Maryland example – they can be ok. Whether a default rule makes sense will likely depend on the context. She would want to see the default rule before weighing in. She pointed out that the Magistrate Judges are very active in this area.
    c. Jennifer Freeman stated that she did not believe default rules were necessary to make the testing effective. It was suggested that the testing could incorporate questions about default rules, such as asking whether it would have helped make the process more efficient/saved costs if the standing order included default rules.
    d. Dan Graham stated that one of the problems with defaults is that the law and technology are changing.
    e. Pauline Levy stated that it is difficult to decide in abstract, you would need to see the specific rule.
    f. Ron Lipinski stated that he was involved in a case involving defaults. The defaults did not work very well in his case, they were out of date, and both parties worked hard to reach agreement so they were not stuck with the defaults. But he likes the idea of setting out what is reasonable.
    g. Tom Lidbury stated that an additional problem with defaults is that the cases involved are so different.
    h. Encouraging compliance. The subcommittee anticipates that its standing order is likely to require the parties to meet and discuss and report on certain issues. The subcommittee is considering permitting Courts to continue the Rule 26(f) conference (and thus continue the start date for discovery) if one or more parties

fails to participate constructively in the process or impedes the goals of the standing order. Art Gollwitzer pointed out that this would provide the Courts with a hammer to encourage cooperation and enforce compliance with the standing order.

i. Josh Karsh agreed that whether defaults would work would depend on the issue. Defaults would not work on the issue of proportionality, but they might work for format of production.

6. Information provided to Judges in the event of a dispute. Josh Karsh stated that one of his concerns is improving the quality of the information brought to the Court when there is a dispute, so the Court can make fully informed decision. The example he provided was cost information in connections with disputes over burdens and costs. You could possible require parties claiming burden and cost to obtain outside bids under certain circumstances.
   a. Dan Graham suggested that the quality of information can be improved through the use of forms, and possibly through additional steps, including possible requirements under certain circumstances to bring some form of client representative who has expertise to the hearing. Dan Graham stated that in fashioning the standing order for the Circuit Court of Cook County, they decided it might be helpful to have a form.
   b. Judge Nolan stated that the more specific the parties make the issue, the better. If the litigant can provide information about the specifics of the problem, it is easier for the Judge to help.
   c. Josh Karsh stated that he believes there are a number of lawyers who do not know how to go to their clients and map data. He suggested it might make sense to come up with a questionnaire for that purpose.
   d. Pauline Levy cautioned that the committee should recognize that it can be very difficult to collect this information at a large organization. They're working on a project to collect this information, and it is a long-term project.
   e. Josh Karsh stated that is why it can make sense to tier discovery. Perform discovery of a few people, but get into significant detail with those few people.
   f. Joanne McMahon stated that at her company, they are generally in a better position to inform this discussion. Josh Karsh said that he would consider what the company says, but he would also want to take a 30(b)(6) deposition to confirm. He stated that he thinks the first step should be to identify custodians.

C. <u>Preservation Letter Subcommittee</u>

1. The Preservation Letter Subcommittee submitted a written status report, which has been circulated to Committee Members. Jim Montana provided an oral summary of the subcommittee's work to date and led a discussion on several issues.
2. They have had a couple lively meetings, in which they discussed a number of matters, including the purpose of letter; the obligations of the sender and recipient; concrete suggestions about what ought to be in the letter; meet and confer requirements; and defaults regarding what the committee is tentatively calling "Volatile ESI" and other issues.

3. Coordination. The subcommittee needs to coordinate with the Early Assessment Committee. What goes in the any proposal regarding preservation letters may affect what goes in standing order.
4. Corporate counsel and preservation letters. Judge Holderman asked corporate counsel for their thoughts on preservation letters.
    a. Pauline Levy stated that most of the letters she receives at McDonald's are inappropriate. She usually sends responses stating what her company will do, and she does not usually hear back.
    b. Joanne McMahon stated that she has had a similar experience at General Electric.
    c. Michael Bolton from Baxter stated that the biggest problem he sees is that the requesters do not understand the facts of the case before sending the letter.
    d. Josh Karsh asked corporate counsel why they cared about overbroad preservation letters given that their obligations are imposed by law, not the letter.
    e. Joanne McMahon stated that not all cases are pending in the Northern District of Illinois or in any federal court. In some of their cases, there are no rules governing e-discovery, and so they must proceed with caution.
    f. Ron Lipinski stated that last week, he received a 21 page letter in a single plaintiff case against a hospital. He stated that if he had followed the instructions, it would have shut down his client's systems. The problem is they still needed to spend time making sure they had preserved enough data. That is why his clients care. He said that you need to have context to make this work – what do plaintiffs reasonably anticipate their case is going to entail.
    g. Judge Nolan asked whether Mr. Lipinski had called the other side in that case, and he said he did. They spoke about specifics, and he did receive some further feedback.
    h. Judge Holderman pointed out another problem – plaintiffs and the plaintiffs' lawyers do not trust the company.
5. Flexibility. Art Gollwitzer pointed out that the proposal the subcommittee is considering would be flexible for different types of cases. It would involve alternating obligations. Judge Holderman pointed out that will be one of the things we will want to test.
    a. Tom Lidbury stated that you are not always sure who the key players are. But it can help if you sort that out early on. It can help avoid spoliation motions.
    b. Natalie Spears asked if they could include something that would make it clear parties cannot seek sanctions if they do not meet and confer on these issues.
    c. Tom Lidbury stated that the goal of the structure they're currently considering is to incentivize cooperation. If a party does what is asked of it during the process, it can set up some safe harbor-type rules specific to that case.
    d. Jim Montana pointed out that this all takes place pre-litigation, and so how can a standing order cover it?
    e. Judge Holderman stated that the Court can communicate through the standing order process what will happen if you do file.
    f. Tim Chorvat pointed out that particularly in this area (where you don't know your Judge), the standing order will be more effective if there is uniformity, if all Judges adopt the standing order.

g. Judge Holderman pointed out that another procedure that may be appropriate in this situation is a general standing order.
h. Michael Kanovitz asked whether, as a practical matter, there is any way for a requester to force a response without filing suit. Art Gollwitzer stated that if the issue is that much of a concern, wouldn't you file suit? He also stated it does not really matter when the letter comes out.
i. Tom Lidbury – one issue he runs into is that requesters frequently do not know why they want to know various things.

3. July Objective – Develop Principles and Procedures for E-Discovery to be Tested in the Seventh Circuit by Trial Courts, Counsel, and Clients Regarding:
   A. E-Discovery Education
   B. E-Discovery Early Case Assessment
   C. E-Discovery Preservation
   D. E-Discovery Ethics and Economics

   Judge Holderman stated that the goal here is to develop principles and procedures that can be tested, so we can have some verification they are helping.

   Judge Holderman raised the question of whether we should have some sort of statement of ethical obligations in e-discovery. Would that help break down the distrust? It should also include a discussion of economics, an obligation that lawyers know why they're making various requests. This would help reduce costs.

   Judge Nolan pointed out that there is a body of law on this. If we end up using the webinar approach to education, we could include a section on this issue.

   Natalie Spears suggested that the education should include what to discuss with the client.

   Every subcommittee should consider this issue of ethical obligations, as well as what should be included in the webinar from their committee.

   Josh Karsh stated that he likes the idea of neutrals in the area of e-discovery disputes, but he does not think it can work if they are lawyers. He asked whether there was any possibility court employees could get involved. Judge Holderman and Judge Nolan said probably not, but they will give it some thought.

   Judge Holderman said there is legislation pending in this area relating to technical assistance for judges in patent cases. Josh Karsh stated that there is private money for this, from Rand and others. We could make the pitch that the process could also be used for testing, comparing cases to which assistance is provided to those where it is not.

   Judge Nolan described a similar concept in the Court of Appeals: 3 full time mediators. Ann Kershaw also has a new concept revolving around reasonable discovery. You bring in one mediator for one session. But instead of hiring her, Judge Nolan likes the idea of volunteers. That works well in the settlement assistance program. We might also be able to use

nonlawyers. Judge Holderman pointed out that one general problem in this area is that the mediators would likely have to have expertise.

4. August Objective – Develop Survey Questionnaires: Pre-Discovery Questions and Post-Discovery Questions to Measure Perceived Effectiveness of Tested Principles and Procedures.

   Judge Holderman stated that Kroll will help with the survey questionnaires. Dan Wolf from Kroll acted as the outside expert in the American jury project.

   Judge Holderman asked all of the subcommittees to think about how we can solve the testing issue. But he also pointed out that we do have experts to help us.

5. Short-Term Goals and Timetable
   A. Next Full Committee Meeting, Wednesday, August 26, 2009, at 4:00 p.m., Room 2541
      1. Finalize Principles and Procedures to be Tested. Judge Holderman stated that we will have a vote to finalize principles and procedures.
      2. Review Survey Questionnaires. Ken Withers suggested one approach in response to Judge Easterbrook's comments about the lack of testing in some past efforts. The point is you can't measure without some form of benchmark. Judge Nolan stated that if we end up with 8 ideas, those 8 ideas could be measured over 9 months to see if they lead to improvement. Judges participating in the process will be given questionnaires as well. Withers' suggestion would include:
         a. Pre-Discovery Questions for Counsel and for Clients
         b. Post-Discovery Questions for Counsel and for Clients
   B. Full Committee Meeting, Wednesday, September 16, 2009, at 4:00 p.m.. Room 2541
      1. Finalize Survey Questionnaires
      2. Final Preparation for October 2001 Implementation
   C. Implement Principles and Procedure with Questionnaires, October 1, 2009
   D. Tabulate and Analyze Questionnaire Responses, October 2009 through April 2010
   E. Publish Preliminary Report of Findings May 1, 2010
   F. Present Preliminary Report of Findings
      1. Seventh Circuit Bar Association Meeting
         InterContinental Hotel, Chicago, IL, May 2-4, 2010
      2. United States Courts E-Discovery Conference
         Duke University, Durham, NC, May 10-11, 2010

6. Long-Term Goals
   A. Continue to Implement Effective E-Discovery Principles and Procedures
   B. Cut the Litigation Costs of E-Discovery in the United States

3. August 26, 2009

Seventh Circuit E-Discovery Pilot Program

August 26, 2009 Committee Meeting Agenda

1. Introduction
   A. Committee Members
   B. Recap of Pilot Program Goals for New Members

2. Summary of Meeting on July 30, 2009 with Rebecca Kourlis, Executive Director of Institute for Advancement of the American Legal System, Denver, Colorado (Ms. Kourlis has agreed to prepare the survey and tabulate results of pilot program.)

3. Subcommittee Reports to Date
   A. Education Subcommittee
   B. Early Case Assessment Subcommittee
   C. Preservation Letter Subcommittee
   D. Discuss Items to Be Resolved in Subcommittee Reports and Suggestions for Resolution

4. Short-Term Goals
   A. Subcommittee Members to Meet with Judge Nolan to Finalize Language of Principles and Standing Order
   B. Next Full Committee Meets Wednesday, September 16, 2009, at 4:00 p.m., Room 2544A, Final Preparation for October 1, 2009 Implementation
   C. Present E-Discovery Pilot Program Initial Report to District Court Judges and Magistrate Judges for Comments and to Determine Who Will Participate in Pilot Program
   D. October 1, 2009 Pilot Program Begins
   E. January 2010 Ms. Kourlis to Submit Proposed Survey
   F. February 24, 2010 Full Committee to Meet to Discuss Progress of Program and to Review Proposed Survey
   G. March 3, 2010 Survey to Be Sent to Lawyers and Judges to Be Returned No Later Than March 24, 2010
   H. April 14, 2010 Surveys Tabulated
   I. Publish Preliminary Report of Findings May 1, 2010
   J. Present Preliminary Report of Findings
      1. Seventh Circuit Bar Association Meeting, InterContinental Hotel, Chicago, IL, May 2-4, 2010
      2. United States Courts E-Discovery Conference, Duke University, Durham, NC, May 10-11, 2010
5. Long Term Goals
   A. Continue to Implement Effective E-Discovery Principles and Procedures
   B. Cut the Litigation Costs of E-Discovery in the United States

Seventh Circuit Electronic Discovery Pilot Program
Minutes of August 26, 2009 Committee Meeting

I. Introduction.

A. Committee Members. The individual members re-introduced themselves.

B. Recap of Pilot Program Goals for New Members.

1. Judge Nolan -- how did this come about? At least a couple factors have contributed to the need for this pilot program:

a. A crisis in the price and amount of time taken up by discovery.

b. A study presented to the judicial conference last February. It included a survey of 12,000 attorneys. The response was almost unanimous that help was needed in this area. The United States Courts is holding a conference at Duke University in May 2010. The agenda is the civil justice system in general, but there will be an emphasis on discovery and e-discovery.

2. Based on his attendance at the judicial conference and his role as the chair of the 7th Circuit jury trial project, Judge Holderman has a very positive view regarding what the Court can do to help lawyers. So he initiated a pilot program to address e-discovery and discovery generally.

3. At an initial meeting in June, this Committee we created three subcommittees. Since that time, the members have put in a lot of work, and we are now moving closer to a finished product. There has been and continues to be significant time pressure. That's been unavoidable given the goal of getting a program in place in time to report results at the May 2010 conference at Duke and the Seventh Circuit conference that same month. A set of principles and a standing order needs to be in place soon to permit sufficient operation under the principles and a survey prior to May 2010. So our schedule has been very tight and it will continue to be until October 1.

4. There are at least three ways in which this committee is unique. First, the membership includes a large number of practitioners. Second, the lawyers on the committee come from diverse backgrounds -- firms representing plaintiffs and defendants, government, universities, and private companies. Third, the committee is charged not only with developing principles, but also with testing them. The committee's work will provide a forum for testing.

II. Summary of Meeting on July 30, 2009 with Rebecca Kourlis, Executive Director of Institute for Advancement of the American Legal System, Denver, Colorado (Ms. Kourlis has agreed to prepare the survey and tabulate results of pilot program.)

A. Ms. Kourlis is a former justice of the Colorado Supreme Court and a former trial judge. She now directs an organization that studies the American legal system.

Judge Holderman and Judge Nolan met with her on July 30, 2009. Also attending were the chairs of the three committees and representatives from Kroll and Trialgraphix.

B. Tom Lidbury, who was at the meeting, stated that she was impressive, and her organization has done this before and will be a great resource.

C. The Institute has previously done smaller studies on e-discovery, but they have not performed testing or follow up, as we are contemplating here. Ms. Kourlis stated that she was excited about the project. The Institute will do the work free of charge. And it will have the survey prepared and ready to implement by January, which will permit this committee to collect 3 months of survey results prior to May 2010.

D. Daniel Graham asked whether there was any discussion at the meeting about pre-principle surveying or data? Judge Nolan stated that a significant amount of time was spent discussing methodology and whether such a base study is necessary. Based at least in part on the lack of time between now and May 2010, the ultimate decision was not to conduct such a pre-principle study. But the plan is to treat the period leading up to May 2010 as Phase 1 of this project/study. The committee involved with the jury project continued its principles into year 2. If this committee does the same, we will have more information by May 2010 and we can adjust the principles at that time, and continue to collect data as necessary. Tom Lidbury also stated that pre-principle survey data may not be that valuable. We should already know from the members of this committee the nature of the many of the complaints about the current system.

E. We are referring to this committee as an e-discovery committee, but the principles or work product appear to relate to all discovery.

F. Ms. Kourlis has many ideas. By January, they will have completed 3 months of internal testing.

III. Subcommittee Reports to Date.

A. Education Subcommittee. Mary Rowland and Kate Kelly led a discussion of the work of the Education Subcommittee, including the following issues:

1. Prior to the meeting, the subcommittee circulated a draft principle and webinar outline. The goal is to have part 1 of the webinar completed by May.

2. Budget issues have come up. The subcommittee needs a professional vendor(s) to work on the webinar and to finalize graphics and powerpoints. The plan is for the webinar to be web-based only, with the same graphics and two voice-over speakers throughout. The subcommittee believes that the presentation should be kept neutral, and should not highlight any firm or attorney. They have brought in a professional to discuss how to complete the webinar.

3. The subcommittee estimates that an initial section presenting an overview and nuts and bolts will last about 1.5 hours. But that presentation on that

topic will broken down into individual chapters, which should permit individual attorneys to move through the presentation more quickly if they are aware of certain concepts and principles.

4. The presentation will look like a podcast, with a voiceover and moving slides.

5. The subcommittee plans to keep each presentation updated. The presentations will also include links to cases and other materials.

6. The subcommittee is currently working on the nuts and bolts overview presentation. They have outlines, which will be turned into scripts. The final product can be used as a template for the early case assessment and preservation presentations.

7. The subcommittee continues to work on the content, but they need studio time and a vendor to complete the finished product.

8. The subcommittee will also likely have live seminars.

9. At this time, it appears that CLE credit will be available.

10. In terms of mechanics, this will not be hosted on the Northern District of Illinois website, the presentations are too large.

11. Judge Nolan asked whether the subcommittee could have some interim materials prepared prior to May 2010 so that we can test out the principles. Kate Kelly suggested that the subcommittee could probably complete a set of links as an interim step at some point soon after October 1. In order to do that, however, there are some questions that need to be answered, including whether this will only involve cases before Northern District Judges, or whether other district court judges will be involved as well. Another issue that needs to be addressed relates to useful information on private firm websites and the fact that linking to such websites could be a problem.

12. Kate Kelly provided a general introduction to the draft principle that was circulated and asked if any of the committee members had any questions.

13. Judge Nolan noted that the principle may need to be reorganized.

B. Early Case Assessment Subcommittee. Karen Quirk presented a summary of the ECA subcommittee's work and draft principles.

1. The subcommittee started meeting in July. Initial drafts were exchanged, which were followed by substantial revisions. The subcommittee then held extensive meetings, and there has been lively debate over the draft principles over the past few weeks. Parties taking both sides of various issues have participated and have made compromises.

2. Judge Nolan asked a few questions.

   a. The e-discovery liaison. The standing orders of Delaware and perhaps Maryland have such a provision. Do we know what other courts have

implemented this requirement and how it has worked? Karen Quirk emphasized that the draft does not provide for such a liaison in every case, but it is mandatory if you have a dispute. Timely access to information is particularly important when disputes arise. Alexandra Buck stated that the draft does not require that the liaison necessarily be one person. Karen Quirk affirmed this point, and stated that there were some concerns within the subcommittee that permitting multiple liaisons might defeat the purpose of the provision. Tom Lidbury pointed out that the goal was to create flexibility. Jim Montana asked whether this provision would add costs. Tom Lidbury stated that that was one of the reasons for flexibility, to try to avoid adding unnecessary costs. Marni Willenson stated that this provision should reduce costs if done properly. Judge Noland stated that she likes the provision because it is something we can test out and see whether it works. Dan Graham pointed out that it was modeled in part on Judge Kendall's standing order.

3. Judge Nolan stated that the only issue she believes is missing from the principles is privilege. Karen Quirk stated that the subcommittee had discussed a privilege principle earlier in the process but it was not incorporated into the draft that was circulated, primarily because the subcommittee ran out of time. Judge Nolan asked that such a provision be added before the principle is finalized, and Karen Quirk stated that the subcommittee would attempt to do that.

4. Ron Lipinski stated that privilege issues are the driving force in many of the cases he's involved in. Rule 502 will help, but the issue also needs to be addressed in early assessment. Judge Nolan stated that a good solid privilege log will cure 50% of problems. She also stated that the subcommittee does not necessarily have to provide an answer to this emerging problem. But the principles should address the issue.

5. Karen Quirk and Tom Lidbury both pointed out that one of the issues the subcommittee addressed is whether we have anything to add beyond what Rule 502 already provides.

C. Preservation Letter Subcommittee. Jim Montana led a discussion of the meetings and draft principles for this committee.

1. The subcommittee had lively discussions, and significant difference of opinion between plaintiff and defense attorneys. He cautioned the subcommittee to do its best to be fair to both sides, members have to put aside biases.

2. The result was draft principles and a standing order. Jim has looked at the principles circulated by the Early Case Assessment subcommittee, and he believes it did a good job of incorporating the relevant principles. Jim pointed out that some of those principles sound like standing orders and they could be turned into standing orders.

3. Judge Nolan stated that the subcommittee did a nice job. She thought the inclusion of examples was a good idea that could be helpful to less experienced attorneys.

4. Judge Nolan asked a question about principle 2.04(b) of the draft ECA principles: what is another party, a third party? Tom Lidbury stated that was intended to be a reference to another party in the case.

5. The committee had an extended discussion regarding the italicized language in draft principle 2.04(b).

   a. Josh Karsh explained his objection to the language. He stated that it is a standard practice to seek discovery re discovery, and that this rule would radically change that standard practice/procedure and require a failure before that discovery could go forward. In addition, it sets up a rule that requires a requesting party to make a prima facie showing that it cannot make absent discovery of the steps the responding party has undertaken. Sedona speaks of transparency and states that parties should document what they're doing in connection with discovery and anticipate inquiries.

   b. Tom Lidbury stated that the principles generally require transparency, and the italicized language was motivated by a concern that parties were starting cases requesting discovery about possible discovery torts. The intent was not to prevent a party from asking a deponent what he or she did to look for documents in response to a document cases. But cases should not start out with depositions regarding e-discovery. Traditionally, the requesting party is not involved in the responding parties' collection of documents.

   c. Dan Graham stated that 30(b)(6) depositions are frequently conducted on this issue, and this is not a new issue. Tom Lidbury stated that there is a concern about full scale discovery into discovery before the parties know whether there is a problem. Dan Graham pointed out that 30(b)(6) depositions on this issue should be unnecessary if the meet and confer is handled properly. Chris King stated that he has been involved in cases in which the parties have had a productive meet and confer, but he has nonetheless subsequently received 30(b)(6) notices, which generate significant costs. The draft principles enhance the meet and confer process, and this discovery should not go ahead absent some issues coming out of that process.

   d. Josh Karsh stated that earlier drafts of the principles contained mandatory reciprocal disclosures as well as a meet and confer requirement. He stated that he would not have the same concerns about the italicized language in 2.04(b) if the principles contained tougher meet and confer requirements.

   e. Jim Montana asked how the prima facie showing would be made. Tom Lidbury stated that like anything else, the parties might reach

agreement and might not. Marni Willenson stated that this might simply add an additional layer of motion practice. Shawn Wood stated that this might simply lead to motions because the party seeking discovery does not know what the responder has done.

f. Jim Montana raised the question of whether this language goes too far and prohibits something that's permitted by 30(b)(6).

g. Judge Nolan stated that there were good points on each side of this issue. She stated that Jim Montana's point is a good one, and she also noted we may need to see how the other judges respond to this language.

h. Judge Nolan volunteered to meet with any committee members who wish to discuss this disputed issue and any other disputed language in the draft principles. The disputed language is set out in italics in the draft ECA principles. All committee members are invited to join the discussion, which will take place on Friday 9/4 at 9:30. Judge Nolan will circulate a call in number for attorneys who are unable to attend in person.

i. Judge Holderman stated that since the work product of this committee may end up being a national standard, we should attempt to hash out these differences. If we are unable to do so, the committee may need to send alternative language to the judges.

D. Discuss Items to Be Resolved in Subcommittee Reports and Suggestions for Resolution. Judge Nolan set up the process for resolving any disputed language as discussed above.

E. Standing Orders. Judge Nolan asked whether it is too soon to have standing orders. One possible option is to operate on principles first, then draft standing orders at the end after we see the assessments. Judge Holderman stated that the purpose of standing orders is to assist Judges in other districts who do not have Magistrate Judges to turn to regarding the meaning of the principles. Judge Holderman stated that he envisioned the committee taking the principles and incorporating them into a standing order. Judge Holderman stated that standing orders may be perceived to have more power/influence. The final product should be one standing order covering the substance of the 3 committees. He would then propose that the Judges adopt that standard order. Jim Montana asked whether the principles would also be available. Judge Holderman said yes: the work product of the committee would be an initial report (that sets out the history, why this work was undertaken, and what the committee has done) that also includes a set of principles and a standing order that the committee believes could be used to implement those principles. Judge Holderman and Magistrate Judge Nolan would take the resulting standing order and attempt to sell that to the other judges in the district. The report of the committee would highlight concerns about costs of e-discovery, and state that e-discovery costs should not be driving the litigation process and litigation decisions. It may be one factor, but it should not be an overwhelming factor.

The plan is to turn the principles into draft standing orders.

IV. Short-Term Goals.

A. Subcommittee Members to Meet with Judge Nolan to Finalize Language of Principles and Standing Order. September 4 meeting.

B. Next Full Committee Meets Wednesday, September 16, 2009, at 4:00 p.m., Room 2544A, Final Preparation for October 1, 2009 Implementation. Judge Holderman stated that the judges will attempt to circulate a preliminary draft at September 16 meeting.

C. Present E-Discovery Pilot Program Initial Report to District Court Judges and Magistrate Judges for Comments and to Determine Who Will Participate in Pilot Program. Judge Holderman stated that the Northern District of Illinois judges are meeting on September 29 at a workshop. He will attempt to convince all of the Judges of the 7th Circuit to participate in the pilot program. He will work on ensuring that, at a minimum, at least one District Judge and one Magistrate Judge participates from every district in this circuit.

D. October 1, 2009 Pilot Program Begins.

E. January 2010 Ms. Kourlis to Submit Proposed Survey.

1. Anything the committee does will end up on the Kourlis website.

F. February 24, 2010 Full Committee to Meet to Discuss Progress of Program and to Review Proposed Survey.

G. March 3, 2010 Survey to Be Sent to Lawyers and Judges to Be Returned No Later Than March 24, 2010.

H. April 14, 2010 Surveys Tabulated.

I. Publish Preliminary Report of Findings May 1, 2010.

J. Present Preliminary Report of Findings.

1. Seventh Circuit Bar Association Meeting, InterContinental Hotel, Chicago, IL, May 2-4, 2010.

2. United States Courts E-Discovery Conference, Duke University, Durham, NC, May 10-11, 2010.

V. Long Term Goals.

A. Continue to Implement Effective E-Discovery Principles and Procedures.

B. Cut the Litigation Costs of E-Discovery in the United States.

Judge Nolan stated that Tom Lidbury has volunteered to attempt to put the 3 sets of principles together in one document. She also raised one practical concern: what cases will be covered? Will this apply to every case or only certain cases, and how should pending cases be handled? We should be able to make proposals on this point to the Judges.

Judge Holderman and Magistrate Judge Nolan stated that with respect to the education committee, we will set up what we can (the webinar website will not be up), and the surveys will solicit thoughts on what would help.

The deadline for the subcommittees to submit draft standing orders is September 11. Tom Lidbury stated that he should also have a combined principles document to circulate by then.

Judge Holderman confirmed that the final work product will be a report, a set of principles, and a standing order.

4. September 16, 2009

Seventh Circuit E-Discovery Pilot Program

September 16, 2009 Committee Meeting Agenda

1. Introduction of Committee Members

2. Subcommittee Reports
   A. Education Subcommittee - Co-Chairs Mary Rowland and Kate Kelly
   B. Early Case Assessment Subcommittee - Co-Chairs Karen Quirk and Tom Lidbury
   C. Preservation Subcommittee - Chair Jim Montana

3. June, July and August Objectives – Met

4. September Objectives
   A. Finalize Principles for Pilot Program (Phase One)
   B. Finalize Standing Order for Pilot Program (Phase One)
   C. Discuss Survey Questionnaires for Pilot Program (Phase One)
   D. Final Preparations for October 1, 2009 Implementation of Phase One
   E. Implement Principles and Procedures of Phase One through Standing Order Entered by Judges Participating in the Pilot Program, October 1, 2009-April 1, 2010
   F. Finalize, Tabulate and Analyze Phase One Questionnaire Responses, Spring 2010
   G. Publish Phase One Report of Findings, May 1, 2010
   H. Present Phase One Report of Findings
      i. Seventh Circuit Bar Association Meeting
         InterContinental Hotel, Chicago, IL, May 2-4, 2010
      ii. United States Courts E-Discovery Conference
         Duke University, Durham, NC, May 10-11, 2010

5. Implementation of Phase Two, July 1, 2010-April 1, 2011

6. Long Term Goals
   A. Continue to Implement Effective E-Discovery Principles and Procedures
   B. Cut the Litigation Costs and Burden of E-Discovery in the United States While Providing Justice to All Parties

Seventh Circuit E-Discovery Pilot Program
Minutes of September 16, 2009 Committee Meeting

In attendance: Michael Bolton, George Bellas, Ronald Lipinski, Daniel Graham, Marie Halpin, Timothy Chorvat, Kathryn Kelly, Thomas Lidbury, Joanne McMahon, Karen Quirk, Arthur Gollwitzer, James Montana, Christopher King., Debra Bernard, Mary Rowland, Tom Staunton, Tiffany Ferguson, Karen Coppa.

I. Introduction of Committee Members.

II. Subcommittee Reports.

A. Education Subcommittee – Co-Chairs Mary Rowland and Kate Kelly. Kate Kelly provided a status of the subcommittee's work.

1. They are still working on the webinar. They have started on the nuts and bolts section. They are looking at possible vendors, working on scripts, etc. Kate Kelly asked for volunteers outside the committee to review scripts. They will

2. After completing that, they will turn to the early case assessment and preservation portions of the webinar.

3. The subcommittee is also working on budgeting issues. They are planning to meet with Judge Holderman regarding the budget. There has been some discussion of using the 7th Circuit website or the Seventh Circuit Bar Association website to host the webinar. In any event, there should be a link from each District Court's website to whichever site is used to host the webinar.

B. Early Case Assessment Subcommittee – Co-Chairs Karen Quirk and Tom Lidbury. Karen Quirk provided a status.

A meeting was held September 4 to discuss any remaining points in the draft principles on which there was disagreement. By the end of the meeting, agreement had been reached on all of the draft principles. Tom Lidbury incorporated the agreed upon language and created the draft of the principles (and corresponding standing order) now before the committee. Judge Nolan stated that she was very appreciative and grateful regarding the strong participation in the September 4 meeting. 20 members participated in person or by phone in a meeting held on the Friday before Labor Day. There was as good and effective give and take on the hardest issues.

C. Preservation Subcommittee – Chair Jim Montana provided a status.

1. He has reviewed the drafts produced by Early Case Assessment Subcommittee, and the concepts and principles raised by the preservation committee are incorporated into those drafts.

2. Judge Holderman acknowledged the work done by Tom Lidbury in reconciling the drafts and comments and putting together the final drafts of the principles and standing order.

III. June, July, and August Objectives – Met.

Judge Nolan has reviewed the committee's objectives for June, July, August, and she confirmed they have been met.

IV. September Objectives.

A. Finalize Principles for Pilot Program (Phase One).

1. Joanne McMahon has been consulting with other in-house corporate attorneys. She stated that this has been a great opportunity to get feedback and comments from corporate counsel at GE and from others around the country.

2. Ms. McMahon proposed a few additional changes to the drafts circulated by Judge Holderman. The additional revisions correct a few typographical errors. Tim Chorvat also made some typographical non-substantive revisions. Those changes will be made.

3. Ms. McMahon also proposed adding an additional sentence to Principle 2.03. As modified by the committee, the additional sentence reads: "Nothing in these Principles shall be construed as requiring the sending of a preservation request or a response to such a request." The committee agreed that that additional language would be added to the end of Principle 2.03, as a new subsection (d).

4. Ms. McMahon also proposed a change to Principle 2.05(b)(1): "duplicative ESI" was added, making the language for the entire subsection "eliminate duplicative ESI and whether such elimination will occur only within each particular custodian's data set or whether it will occur across all custodians."

5. Jim Montana made a motion to adopt the General Principles as proposed and amended today. The motion was seconded by Debra Bernard. A vote was held, and all voted yes.

B. Finalize Standing Order for Pilot Program (Phase One).

1. Judge Holderman will make the same revisions to the language of the draft standing order, which was also circulated before the meeting.

2. Daniel Graham proposed that each of the headings in the order be revised to "section" rather than "principle." The opening section will be the introduction.

3. The committee agreed to make this change. Two other similar changes will be made: "Principles" in the text will be replaced with "Order." In the opening to the Order, "which are set forth below" will be revised to read "from which the following principles are derived."

4. Judge Holderman will make these changes to the Standing Order.

C. Discuss Survey Questionnaires for Pilot Program (Phase One).

1. Judge Nolan discussed the status of the survey. Judge Kourlis was not able to attend this meeting, but she has been in touch with Judge Holderman and Judge Nolan. Ms. Kourlis is eager to get started, and they want to get in touch with members of the committee. One issue she has raised is how this will be marketed and publicized with attorneys. Judge Holderman and Judge Nolan have arranged for a contact person at the District Court to set this up electronically and to act as the contact person for Judge Kourlis.

2. They have discussed 2-3 aspects of the survey process. The first 2 are straightforward – attorneys and judges will be surveyed. The third – a possible survey of clients -- is more problematic and raises attorney-client relationship issues and concerns over discoverability of the information provided in response to the survey.

   Judge Holderman and Judge Nolan discussed trying to address these concerns by using a check box format and making the responses anonymous. Several committee members raised concerns about parties being asked to provide the responses in response to discovery requests in other cases. The general consensus was that clients would like to be heard in these surveys, and we would like to hear from clients, but it may be difficult to ensure that the responses would remain confidential.

   Joanne McMahon stated that the clients are paying the bills, so they would like to have some say on these issues. And many of the corporate representatives she has spoken to have stated that they are happy with the reasonable, positive nature of this project, and they would like to build on that.

   The committee members agreed that whether client confidentiality can be adequately safeguarded, and what safeguards are necessary, may depend on the nature of the subjective questions being asked.

   Karen Coppa also raised questions about government agencies and possible obligations to preserve these responses.

   Tom Lidbury suggested that these confidentiality concerns could be addressed through the use of a Rule 502(b) order because these survey responses would constitute mental impressions of lawyers.

   Judge Nolan provided the committee with some of the types of "objective" information Ms. Kourlis will be requesting: time from filing to disposition, motions on disputed discovery including time, motions for protective order, number of conferences/pretrial, pretrial orders re ESI, motions to continue deadline filed and granted, motions for sanctions. At this time, we do not know what "subjective" questions Ms. Kourlis would like to include on the surveys.

The members discussed the possibility of getting client input in another way – perhaps by reaching out to them generally for input and feedback not tied to any particular case.

Tom Lidbury suggested we table this issue until we have the subjective questions. Joanne McMahon suggested the creation of a survey subcommittee to review questions with Kourlis.

The committee agreed to table the issue of direct client participation in the surveys.

3. At this time, there is no plan to survey a control or comparison set of cases that are not using the principles and standing order. Ms. Kourlis has asked that 15-20 judges provide about 10 cases (150-200 cases overall) for participation in the program and the survey. The individual judges will need to select the 10 cases that will participate in the project. Ms. Kourlis has been trying to get some control study information directly from clients.

   Tom Staunton raised the question of whether, given the limited number of cases included in the program (10 per judge), we could also survey an equal number of similarly situated cases not participating in the program. Judge Nolan stated that the idea is to do that later. Tom Lidbury suggested that even without such a control group, the survey will incorporate some control principles because lawyers will be responding in light of their experience outside the program.

   Art Gollwitzer stated that we should be able to select similar control cases at the same moment in time.

4. Judge Holderman stated that these are issues that need to be fleshed out with Judge Kourlis. But he also stated that the idea of including in the survey some additional cases not using the program would make sense.

5. Dan Graham asked whether parties that wish to use the principles and standing order will be permitted to do so. Judge Holderman stated that yes, they will not limit the number of cases in the program.

D. Final Preparations for October 1, 2009 Implementation of Phase One.

1. Judge Nolan stated that the ten Northern District of Illinois magistrate judges have already signed on to the program. Judge Holderman will be talking to the other NDIL Judges about participating. We should know within a week which District Court judges in this district plan to participate. Will also know shortly which District Court judges from other districts plan to participate. Judge Nolan will contact the magistrate judges in the districts outside the Northern District of Illinois to solicit their participation.

2. On October 7, Judge Holderman and Judge Nolan plan to have a lunch at which they will discuss with the other judges exactly how to implement the program. The goal is to make implementation as simple as possible.

3. Judge Holderman and Judge Nolan have been attempting to think of ideas for marketing/publicizing the principles and standing order. They are hoping that the Seventh Circuit Bar Association, the CBA, and the ISBA will help publicize the program. Dan Graham will assist with the CBA and ISBA. Jim Montana will assist with the Seventh Circuit Bar Association, and Tim Chorvat and George Bellas will assist with the ISBA. The committee is also planning to include a piece on the program in the law bulletin and on the Northern District of Illinois website. The piece will also be pushed out to all e-filers as well.

4. Daniel Graham asked whether the bankruptcy judges would be included. Judge Holderman said he would speak to them to solicit their participation.

E. Implement Principles and Procedures of Phase One through Standing Order Entered by Judges Participating in the Pilot Program, October 1, 2009 – April 1, 2010.

F. Finalize, Tabulate and Analyze Phase One Questionnaire Responses, Spring 2010.

G. Publish Phase One Report of Findings, May 1, 2010.

H. Present Phase One Report of Findings.

1. Seventh Circuit Bar Association Meeting, Intercontinental Hotel, Chicago, IL May 2-4, 2010.

2. United States Courts E-Discovery Conference, Duke University, Durham, NC, May 10-11, 2010.

3. Debra Bernard pointed out that because of the short time frame between now (and January for the survey) and May 2010, the information we're able to get by that time may not be terribly useful.

4. Judge Holderman pointed out that they will also present at an additional conference on May 5, 2010. We may also present at an ISBA conference involving national business judges. He also pointed out that at all of these conferences, we will be providing updates regarding what has happened to date and what we plan to do in the future. Natalie Spears pointed out that cases on a preliminary injunction track might provide more useful information because of tight time schedules. Judge Nolan also stated that in the 10 cases selected, there could be some vigorous meet and confers in the 4.5 month period between January and May.

5. Judge Holderman stated that committee members should feel free to tell Judges they are appearing before to contact Judge Holderman and Judge Nolan about the program and participation in the program.

6. Judge Holderman explained the mechanics: in cases participating in the program, the standing order will be entered as an order in that case. The Standing Order will be voluntary for Judges, but mandatory once it's entered in an individual case.

7. Judge Nolan stated that she has heard from some Judges that they have not had significant e-discovery, but she pointed out that this will be applicable to non-ESI discovery as well. Art Gollwitzer pointed out that all cases involve e-discovery, even if the lawyers do not realize that is the case.

8. Judge Nolan stated that status and timing will be important considerations in the selection of individual cases to include in the program.

9. Judge Holderman pointed out that one of the reasons for including only selected cases is that it may make judges more willing to participate.

10. The co-chairs will continue to communicate with Judge Holderman and Judge Nolan regarding the status of various aspects of this project. A meeting of the entire committee will be scheduled at a later date.

11. Joanne McMahon agreed to contact people with whom she has been in contact to let them know this is starting.

12. Judge Nolan created a subcommittee to address survey issues. Joanne McMahon and Natalie Spears will act as co-chairs. Tom Staunton, Debra Bernard, Karen Coppa, and Marie Halpin also agreed to participate in the committee.

13. Judge Holderman agreed to distribute final versions of the principles and standing order tomorrow.

14. Judge Holderman repeated his thanks to the committee for its work.

V. Implementation of Phase Two, July 1, 2010-April 1, 2011.

VI. Long Term Goals.

A. Continue to Implement Effective E-Discovery Principles and Procedures.

B. Cut the Litigation Costs and Burden of E-Discovery in the United States While Providing Justice to All Parties.

5. January 27, 2010

Seventh Circuit Electronic Discovery Pilot Program

January 27, 2010 Committee Meeting Agenda

I. Welcome - Chief Judge James Holderman and Magistrate Judge Nan Nolan, Committee Chair
   A. Committee Members Introduction
   B. Recap of Pilot Program Goals for New Members

II. Report from the Court - Judge Nolan
   A. Cases
   B. Judges

III. Subcommittee Reports
   A. Early Case Assessment - Co-Chairs Karen Quirk and Thomas Lidbury
   B. Preservation - Chair James Montana
   C. Education - Co-Chairs Kathryn Kelly and Mary Rowland
      1. Seventh Circuit Bar Website
      2. Webinar February 17, 2010
   D. Survey - Co-Chairs Joanne McMahon and Natalie Spears
      1. Review and Final Approval of Attorneys' Survey Questionnaire (Attached)
      2. Review and Final Approval of Judges' Survey Questionnaire (Attached)
   E. Marketing
      1. Past
      2. Future

IV. Schedule for Completing Phase One Report

1/27/10	Full Committee Finalizes Judges' and Attorneys' Survey Questionnaires
By 2/15/10	Judges' and Attorneys' Questionnaires Electronically Administered
By 3/1/10	Survey Questionnaire Responses Electronically Received; Analysis Begins
By 4/1/10	Analysis Completed; Final Preparation of Phase One Report
By 4/20/10	Full Committee Finalizes Phase One Report

V. May 3, 2010 Presentation of Phase One Report at Seventh Circuit Bar Association Meeting, InterContinental Hotel, Chicago, IL

VI. May 10, 2010 Presentation of Phase One Report at the Judicial Conference of the United States, Advisory Committee on Civil Rules Conference, Duke University, Durham, NC

VII. Preparing Phase Two - June 1, 2010 to May 1, 2011

VIII. Planning Phase Three - June 1, 2011 to May 1, 2012

With the thanks of all of us on the Committee, notes of the meeting will be taken by Tom Staunton, our Official Committee Secretary.

Seventh Circuit Electronic Discovery Pilot Program
January 27, 2010 Committee Meeting Agenda and Minutes

I. Welcome -- Chief Judge James Holderman and Magistrate Judge Nan Nolan, Committee Chair

A. Committee Members Introduction

B. Recap of Pilot Program Goals for New Members. Judge Holderman and Magistrate Judge Nolan provided a brief summary.

Currently, the Committee is in the process of preparing surveys. Once the surveys are completed and sent to participants, we expect to present the results in early May and mid-May. The Committee's accomplishments to date have been significant. The Principles have been completed and are on line at the Seventh Circuit Bar Association's web site since October 7. Since then, most of the work has been through the education and survey subcommittees. The survey being conducted will help us test and improve upon the Principles.

II. Report from the Court - Judge Nolan

Judge Nolan provided a brief report on the cases and judges participating in the program. For Phase 1, we have 13 judges and 79 cases in the program. The judges and lawyers from those cases will complete the survey. Based on the survey results, the Committee will determine whether and how to modify the Principles.

III. Subcommittee Reports

A. Early Case Assessment - Co-Chairs Karen Quirk and Thomas Lidbury

Karen Quirk reported that this subcommittee has been quiet since October.

B. Preservation - Chair James Montana

Tom Lidbury reported that the same is true for the preservation subcommittee.

C. Education – Co-Chairs Kathryn Kelly and Mary Rowland

1. Seventh Circuit Bar Website

2. Webinar February 17, 2010

3. Kate Kelly and Mary Rowland provided a report.

A free webinar/podcast is scheduled for February 17 at noon. It will be hosted by law.com without charge to the Committee, and it will be available nationally.

Registration is already available at the site. After February 17, the webinar will be available for 90 days at law.com and then indefinitely at TCDI (Mickey Redgrave).

The webinar will feature a walk-through of the Principles. Its speakers will include Judge Nolan and Tom Lidbury and Alexandra Buck, and Judge Holderman will give an introduction. The program will be advertised to all e-filers (there are 16,600 in all) through a pushed out invite.

Judge Nolan pointed out that law.com did a webinar in December on privilege logs in which 450 people participated. The webinar regarding the Principles will also be advertised to registrants at law.com's website. The Committee will receive information regarding who participated in the webinar.

This first webinar will be an overview. Later, the subcommittee plans to add a glossary and audio and web podcasts with more specific information.

D. Survey - Co-Chairs Joanne McMahon and Natalie Spears

1. Review and Final Approval of Attorneys' Survey Questionnaire (Attached)

2. Review and Final Approval of Judges' Survey Questionnaire (Attached)

3. Joanne McMahon and Natalie Spears provided a report and led a discussion of the draft surveys that had been circulated. They also thanked the other members of the subcommittee and Corina Geraty for their work on the surveys.

The intent of the survey is to get feedback and provide a snapshot of how the program is working during Phase I and how effective the rules have been. Natalie Spears pointed out that the subcommittee was working within certain limitations relating to surveys involving human subjects.

The subcommittee started the project by drafting hypotheses based on the Principles themselves. Those hypotheses were then translated into survey questions.

The subcommittee had to address a number of issues regarding the scope and substance of the surveys. For example, at this point, the subcommittee is recommending surveying only judges and attorneys. A possible client survey was deferred based on a number of considerations – including the short (2 week) turnaround necessary under our current schedule, a possible chilling effect based on privilege concerns and confusion, and questions about possible significant overlap between the information that might be gathered from a client survey and what we are already obtaining from lawyers. The subcommittee suggested that client surveys may be performed later, at the conclusion of case.

A number of considerations affected the form of the final draft surveys. For example, for judges, who are frequently surveyed and thus can experience survey fatigue, the subcommittee set up the survey in a way that permits each of the participating judges to complete one survey covering all of their cases in the program. The narrative portion of the survey will give judges an opportunity to provide information on specific cases.

Alexandra Buck asked whether some of the cases in the program might have progressed to a stage later than the Rule 16 conference. Judge Nolan stated that in selecting cases, we attempted to include cases at all stages of litigation. We are attempting to get lawyers to use the Principles at various stages of case.

Natalie Spears pointed out that this will not be a statistical survey. Rather, it is more of an information-gathering process. We may attempt to do more of a statistical study as part of Phase II of the program.

Joanne McMahon provided more detail about the lawyer survey. The survey will be sent to the attorney of record and the cover memo will ask that it be completed by the attorney most knowledgeable about the case.

The subcommittee sought additional feedback on one issue: how to define a high volume e-discovery case (Q12 of the attorney survey)? There were two suggestions in response to the subcommittee's proposed definition: increasing the GB threshold to 200 GB and adding a reference to structured data. Sean Byrne agreed to provide draft language regarding the structured data issue. Natalie Spears and Judge Holderman emphasized the importance of finalizing the draft surveys promptly. Committee members were asked to provide all comments by the end of the week.

Natalie Spears provided additional background regarding how the survey will be administered in Phase I. The Federal Judicial Center, which has experience in these surveys and is very good at this, has offered to help. They will take the survey and turn it into an email with a link to the survey. The email will be sent to lead lawyer in each case. (Identifying information will be available only to the FJC.) The e-mail author will be Judge Holderman.

The FJC will take the survey results, strip them of identifying information, and send them to the Institute for Advancement of the American Legal System in Denver. We will work with the Institute to analyze the data in a very short time, approximately 2-3 weeks. We then have a short time to turn around a report. There will be a team of people at the FJC helping with the report, led by Dr. Meghan Dunne. This is a very fast turnaround we are planning.

In Phase II, the FJC will take over the principal data analysis role. The hope is to make the process more seamless by consolidating within the FJC functions

that were previously split between the FJC and the Institute. In Phase II, we hope to create a statistical study.

Judge Holderman and Judge Nolan emphasized that the increased role of the FJC should help in several ways. First, it is very experienced in this. Second, it should be able to help the Committee in targeting other useful participants in the program and survey, and it may be able to help the Committee turn this into a national survey.

Dan Graham asked whether the subcommittee made a conscious decision to speak of the Principles as opposed to the Order entered in each case. After a brief discussion, the Committee decided that the goal here is to test the Principles, and thus is makes sense to speak of the Principles in the surveys. Judge Holderman stated that he does not think it is necessary to note the relationship between the Principles and the Order, and the Committee agreed.

Judge Holderman and Judge Nolan thanked the Committee members for their work on this. They also reiterated that the surveys must be finalized by Friday in order to keep this project on track.

Judge Holderman noted that since we are not conducting a client survey, we may wish to provide as part of the final Phase I report separate feedback from general counsel. A couple possibilities were discussed: a discussion of why client feedback is important and feedback from general counsel who sit on the Committee.

E. Communications and Outreach

1. Past efforts

Since the outset of the program, Judge Nolan has attempted to communicate the benefits of the program and work on outreach. For example, in November, one of Inns of Court conducted a good program that Sidley & Austin hosted. The program provided an excellent teaching opportunity relating to the pilot program. There were 50 people involved, and they were enthusiastic. Those people then went back to the Judges in the cases they're litigating to encourage use of the program. Allison at Applied Discovery also did a program at the Union League Club, in which Tom Lidbury and Karen Quirk participated. The panel had a lively discussion on the differences between the approach in our pilot program and the approach reflected in the District of Kansas' standing order.

In November, every federal judge in United States received an introduction to the program via the federal judge newsletter (the Third Branch).

In January 2010, Judge Holderman spoke at a seminar on ethics and electronic discovery.

On February 1, 2010, Judge Holderman was interviewed by Metropolitan Corporate Counsel magazine, which has a circulation of approximately 30,000. The magazine features an article regarding the pilot program.

2. Future efforts

The webinar is scheduled for February 17. There will also be a Federal Bar Association Program in February.

Judge Nolan stated that the Committee needs a Communications and Outreach subcommittee that can act as a central place to collect and coordinate information about the program and the Committee's outreach and communication efforts. The subcommittee will collect and circulate presentations on the program and speaking opportunities and seminars about the program. The possibility of a speakers' panel and a group of attorneys willing to be interviewed by the media was also discussed.

Steven Teppler and Alexandra Buck volunteered to co-chair of the new subcommittee. Other Committee members volunteered to participate and/or contribute their powerpoints and other presentations materials.

Judge Holderman pointed out that Judge Kravitz has been involved in this. He also discussed a NILA conference in May and the possibility of the program being added to the agenda. That conference presents a good opportunity for outreach regarding the program and why it is good for lawyers and clients. Marie Halpin also noted that she has received articles about the program which she will forward to the new subcommittee so we can be sure to keep our contact list (for news about the program) updated.

Judge Holderman pointed out that communications and outreach is also important to recruitment of judges. There are still judges who believe they do not have cases involving e-discovery. Judge Nolan is now reviewing every case she has and including all appropriate cases in the program, and other magistrate judges are doing the same. She also pointed out that one thing we have been less successful at, and that we need to keep working on, is getting judges outside the Northern District of Illinois to participate. Natalie Spears noted that in Phase II, if we are going to perform a statistical study, we will need to pay attention to, and standardize, the method for selecting cases to include in the program.

In late May or early June, the Committee hopes to generate enough enthusiasm so that cases from around the country are included. Judge Nolan also pointed out that after we start getting results from Phase I, the original subcommittees will be more active again.

Judge Nolan once again acknowledged the Committee members' hard work. She pointed out that she told a reporter from the American Law Journal that that is the real story here.

IV. Schedule for Completing Phase One Report
1/27/10 Full Committee Finalizes Judges' and Attorneys' Survey Questionnaires
By 2/15/10 Judges' and Attorneys' Questionnaires Electronically Administered
By 3/1/10 Survey Questionnaire Responses Electronically Received; Analysis Begins
By 4/1/10 Analysis Completed; Final Preparation of Phase One Report
By 4/20/10 Full Committee Finalizes Phase One Report

The next meeting of the full Committee will be held on April 20, 2010 at 4 pm. A draft Phase I report will be circulated prior to the meeting. The comments of the full Committee will be incorporated, and the report will be finalized and distributed to the public before May 1.

V. May 3, 2010 Presentation of Phase One Report at Seventh Circuit Bar Association Meeting, Intercontinental Hotel, Chicago, IL

The next step will be a presentation at the Seventh Circuit Bar Association meeting. The program has been scheduled as the lead topic on the first day of that meeting, a position typically reserved for the theme of the meeting. Judge Holderman will moderate, and other judges will provide reaction and feedback. Judge Holderman plans to acknowledge Committee members. He encouraged Committee members to attend so they can be recognized and so they can help generate enthusiasm for Phase II. The presentation will start Monday morning at 9 am at the Intercontinental Hotel. The Phase I report will be available on line and in hard copy.

VI. May 10, 2010 Presentation of Phase One Report at the Judicial Conference of the United States, Advisory Committee on Civil Rules Conference, Duke University, Durham, NC

Then, one week after the Seventh Circuit Bar Association meeting, Judge Holderman will present at the federal judicial conference. Judge Holderman stated that the Judges involved in that conference are very interested in this program and interested in what we have done, which will add to the enthusiasm for the program. Judge Holderman believes that by May 2012, the implementation of the Principles developed by this program will have begun to change the culture of litigation in the United States. He stated that at the Committee's first meeting, and he thinks we are well on our way to achieving that goal and we will achieve it.

VII. Preparing Phase Two - June 1, 2010 to May 1, 2011

VIII. Planning Phase Three - June 1, 2011 to May 1, 2012

6. April 20, 2010

Seventh Circuit Electronic Discovery Pilot Program

April 20, 2010 Committee Meeting Agenda

1. Introduction of Committee Members
2. Subcommittee Reports
   A. Education Subcommittee - Co-Chairs Mary Rowland and Kate Kelly
      - April 28, 2010, 12:00 PM (CDT) Webinar
        "You and Your Clients: Communicating About E-Discovery"
   B. Early Case Assessment Subcommittee - Co-Chairs Karen Quirk and Tom Lidbury
   C. Preservation Subcommittee - Co-Chairs Jim Montana and Tom Lidbury
   D. Survey Subcommittee - Co-Chairs Joanne McMahon and Natalie J. Spears
   E. Communications and Outreach - Alexandra G. Buck and Steven W. Teppler
3. Phase One Objectives – Met
   A. Finalize Report on Phase One at April 20, 2010 Meeting of Full Committee
   B. Publish Report on Phase One - May 1, 2010
   C. Present Report on Phase One at:
      I. Seventh Circuit Bar Association Meeting
      InterContinental Hotel, Chicago, IL, May 2-4, 2010
      ii. 2010 Civil Litigation Conference
      Duke University, Durham, NC, May 10-11, 2010
4. Implementation of Phase Two, July 1, 2010-April 1, 2011
5. Long Term Goals
   A. Continue to Implement Effective E-Discovery Principles and Procedures
   B. While Providing Justice to All Parties Cut the Litigation Costs and Burden of E-Discovery in the United States
6. Next Meeting

Seventh Circuit Electronic Discovery Pilot Program

April 20, 2010 Committee Meeting Agenda

I. Introduction of Committee Members

A. Judge Holderman made a preliminary statement to the Committee. He stated that this group first met May 20, 2009. We had great enthusiasm. Ron Lipinski raised the issue of education. Jim Montana raised the issue of preservation, and Karen Quirk raised the Early Case Assessment. Judge Holderman stated that he is proud of what this group has done. It is an outstanding group that has volunteered significant time and energy. He stated that the Committee is one of the best examples of grass roots professionalism he has ever seen. He stated that he could not be prouder of what we've accomplished, and he applauds all of the Committee members.

B. Judge Nolan stated that she is overwhelmed by the spirit of coming together and the Committee's response to the fast schedule. She is happy that we are now in a position to present this program to the whole circuit. Everyone has learned from the process, and there has been an incredible give and take. She hopes Committee members will stay on for Phase Two. 16,500 attorneys practice in NDIL, and this Committee has had an impact on them.

C. Introduction of Committee members. Each Committee member introduced him or herself.

II. Subcommittee Reports

A. Education Subcommittee - Co-Chairs Mary Rowland and Kate Kelly. Kate Kelly provided an update.

The second webinar was taped today. It will be broadcast April 28, 2010 at 12:00 PM (CDT). It is titled "You and Your Clients: Communicating About E-Discovery."

The first webinar was more of an overview. 1000 attorneys signed up for the first webinar. Thus far, 835 have signed up for the second. We have no future webinars planned at this time, but there are 8 additional topics to be covered.

Kate raised a couple questions about the 7th Cir. Bar Ass'n meeting:

1. We will make a separate printed copy of the Report available at the meeting. Most of the distribution will be as part of the general CD Rom containing all of program materials. The Committee thought that was a good idea, and the Report will be included on the same CD.
2. Judge Nolan raised an additional issue. We may be able to put the pilot program on a flash drive and pass out the flash drives at the meeting. TCDI will provide 1000 free of charge. TCDI will put their logo on the flash drives. They will be available at the table.

3. The program will have a table in the registration room. We would like to have the table covered on Monday from 7:30am – 12. We plan to have the report available. Volunteers will be available to answer questions. We will not be able to play the webinar at the table. We may be able to have a laptop available with the 7th Circuit Bar Ass'n website up. Committee members were asked to contact Kate if they are willing to volunteer.

Tom Lidbury stated that at his firm, the docket department is cutting the webinar notices off. They were not going directly to the attorneys. Tom said that he is getting the issue corrected at his firm. Judge Holderman asked Committee members to double-check with their firms to confirm that this is not also happening at their firms.

Judge Holderman stated that we sent out 16,000 notices for the webinar to NDIL attorneys. He stated that he has asked the other district court clerks to send the notice to their lawyers as well.

B. Early Case Assessment Subcommittee - Co-Chairs Karen Quirk and Tom Lidbury. Karen Quirk provided an update.

The subcommittee has not met since the drafting of the principles. Karen and Tom have worked on the Phase One Report. Judge Holderman stated that Karen and Tom added some great material with responses to individual attorney comments.

C. Preservation Subcommittee - Co-Chairs Jim Montana and Tom Lidbury. Tom Lidbury provided an update.

The subcommittee has not meant since the drafting of the Principles.

D. Survey Subcommittee - Co-Chairs Joanne McMahon and Natalie J. Spears. Natalie Spears provided an update.

Natalie stated that the FJC has been tremendous in its support. The subcommittee's next big task is to determine what changes need to be made in the next phase to get statistical data from the survey.

Judge Holderman stated that for subsequent surveys, there are some consistencies we want to achieve between the surveys, and there are some additional areas we may want to assess. Judge Holderman thanked the survey subcommittee for all of its work. He also stated that he found some of the attorney comments are interesting.

E. Communications and Outreach – Co-Chairs Alexandra G. Buck and Steven W. Teppler. Alexandra Buck provided an update.

Alexandra stated that while other subcommittees are ramping down, this subcommittee has been ramping up. Committee members should have received

an invitation to the PB Works site. It is a private site for Committee members. Members can take materials from the site and share with them with who you like. They can also add materials and tweak materials on the site.

The subcommittee has been receiving a lot of press inquiries. Alexandra asked Judge Holderman when we could release the Phase One Report. Judge Holderman stated that the Report could be released some time next week. He also stated that we will need a media release to go along with it. Alexandra and Steve agreed to work on that.

The Phase One Report will be on the 7th Circuit Bar Ass'n website in advance of the meeting. The Committee discussed going live next Wednesday, April 28.

The final report has the names of the 130 cases. Judge Nolan raised the question of whether we wish to include the names of the cases. The Committee decided to include the names of the cases in the Report.

The full survey report will not be included in hard copy of the Report. It will be on 7th Cir. website only. That's true of the other items in the Appendix (item 12 in the Report) as well.

Alexandra and Steve asked about speaking requests they have been receiving. Judge Holderman stated that members of the Committee should handle those speaking engagements. Judges are frequently asked to participate. But they do not have time and the Committee members are very knowledgeable on these matters.

Legal Tech West is doing a presentation highlighting the Program. They will focus on the program, what they've experienced in the program. They are located in Los Angeles.

The ABA, at a conference in Chicago is also doing a mock 26(f) meeting. They will be videotaping it at Kent. It will be shown live streamed and it will be available as a free CLE item.

Members were told to contact the Communications and Outreach team if they want to be considered for speaking requests.

Judge Nolan stated that the Committee is receiving many requests for new members. At the meeting of subcommittee chairs a couple weeks ago, Judge Nolan put a moratorium on new members until we see more Wisconsin and Indiana lawyers on the Committee. We also need to see more client representation.

One new Committee member asked about how best to help, and what subcommittees will be more active in Phase Two. Judge Nolan stated that all of the subcommittees will be more active soon, and there may be additional subcommittees.

III. Phase One Objectives – Met

A. Finalize Report on Phase One at April 20, 2010 Meeting of Full Committee

B. Publish Report on Phase One - May 1, 2010

C. Present Report on Phase One at:

i. Seventh Circuit Bar Association Meeting
InterContinental Hotel, Chicago, IL, May 2-4, 2010

ii. 2010 Civil Litigation Conference
Duke University, Durham, NC, May 10-11, 2010

Judge Holderman stated that there is a lot of enthusiasm about the Program. He forwarded an email from Steve Puiszas yesterday that stated that some are advocating that several ideas from the Principles be made law. Judge Holderman had stated that initially when the group first met. He has no doubt that this will be part of future changes in the law. He also believes it will change the culture of the process of civil litigation in the US.

Mike Monico, the President of the Seventh Circuit Bar Association, discussed the Association's upcoming meeting. There will be Sunday night activities and a Monday morning opening. He encouraged all Committee members to come and participate in the conference.

At the meeting, Judge Holderman will introduce the program and moderate a panel discussion of judges. He plans to introduce Committee members who are present. He will ask the assembled members to applaud the group.

Judge Holderman then went through the draft Report page by page and solicited comments from Committee members. The following is a list of the comment/changes received.

P2. Par. 1, change "Judge's" to "judge survey."
-- strike "meaningfully" in 3d par.
P3. Will add reference to the fact that more webinars are planned.

P9. Moved Tom Staunton up on the list and added all members through today. Asked members to check their contact information.
-- Michael Hartigan: Hartigan & O'Connor, PC is the new name of the firm.
-- Steven Teppler: "Edelson McGuire" is the name of the firm rather than McGuire Edelson. Steve Teppler's email is at edelson.com.
-- Tim Chorvat and Robert Byman: Jenner's new address is 353 N. Clark St. Its new zip code is 60654.
-- Jennifer Freeman: Kroll's new address is 155 N. Wacker, Suite 1500.
-- Sean Byrne: has moved to 311 S. Wacker, Suite 450 60606. 312-772-2063.

P17. 4th par. delete comma after "principles" in last line.
-- 2d par.: change "private practitioners" to practitioners.

P20. Strike Hilary Lane's name.
P21. Fix Tom Staunton's name and firm

P28. Second to last paragraph -- change to active US District Judges.

P32. Fix spacing in second to last paragraph. Also, for Meghan Dunn, there is a spacing problem on name of firm.
P33. 3d par. –spacing.
P35. Reword counsel reference.

P38. Delete one of the "too early to tell."
P42. Spacing issue.

P51. Right before point B, says least, should be "lead."

P53. (a)(2). "he" should be "the."
P55. First par. "effect on" in third to last line. Also – missing a period in the citation earlier in paragraph.
P57. Cite to Appendix E2, a missing period at end of cite. The last sentence before F is also missing period.
P58. 2d par. of d(1), 4th line down: "to be relevant and discoverable." Also – spacing off on that page.
P59. Last line before 2 – extra "the." Also – next par., should be Phase One "implementation" rather than implement. Also – first sentence under 2 should say less than 10% rather than 7%. Also – change the wording of that sentence.

P60, point (c), second to last line. Change from "its" to "their."
P61, 1st par, third line from bottom. "Is" should be changed to "was." Also – third paragraph, missing period in citation.

P61. Very last sentence. Need to add "avoid" before combative.

P63. First full paragraph, 3d line. Change "necessitate" to "necessitates."

P69. Tiff should be all caps. Also change from June 1 to July 1 for the start of Phase Two. Will take the following language out of the 2d par.: "typically native unless modified."

The Appendix will be available on the website.

The e-mail address listed in the report should be set up so it forwards to Steve and Alex.

IV. Implementation of Phase Two, July 1, 2010-April 1, 2011

V. Long Term Goals

A. Continue to Implement Effective E-Discovery Principles and Procedures

B. While Providing Justice to All Parties Cut the Litigation Costs and Burden of E-Discovery in the United States

VI. Next Meeting

Judge Holderman stated that it has been 11 months to the day from our first meeting. He reiterated that the Committee has done a terrific job.

Judge Nolan stated that subcommittee chairs should circulate e-mails and set up meetings for the last 2 weeks of May or the first week of June. The next full meeting of the Committee will be Wednesday, June 16 at 4 pm.

The meeting was adjourned.

7. June 16, 2010

Seventh Circuit Electronic Discovery Pilot Program

June 16, 2010 Committee Meeting Agenda

1. Introduction of Committee Members

2. Subcommittee Reports
   A. Education Subcommittee - Co-Chairs Mary Rowland and Kate Kelly
   B. Early Case Assessment Subcommittee - Co-Chairs Karen Quirk and Tom Lidbury
   C. Preservation Subcommittee - Co-Chairs Jim Montana and Tom Lidbury
   D. Survey Subcommittee - Co-Chairs Joanne McMahon and Natalie J. Spears
   E. Communications and Outreach - Co-Chairs Alexandra G. Buck and Steven W. Teppler

3. Phase One 2010 Goals Met
   A. Finalized Report
   B. Presented Report on Phase One
      (1) Seventh Circuit Bar Association Annual Meeting and Judicial Conference
      (2) 2010 Civil Litigation Conference, Sponsored by the Judicial Conference Advisory Committee on Civil Rules, Duke University Law School

4. Phase Two
   A. Duration of Phase Two July 1, 2010 – May 1, 2012
   B. Modifications to Principles/Standing Order
   C. Baseline Survey
   D. Participation of Judges
      (1) E-mail Request
      (2) Orientation/Training
   E. Committee Membership
      (1) New Members
         (a) Plaintiffs' Lawyers
         (b) Indiana, Wisconsin, Southern Illinois
         (c) Outside Seventh Circuit
      (2) Inactive Status
   F. Webinars

5. 2010-11 Goals
   A. Expand Pilot Program Within and Beyond Seventh Circuit
   B. Seventh Circuit Bar Association Annual Meeting and Judicial Conference - May 2011

6. Long Term Goals
   A. Continue to Implement Effective Discovery Principles and Procedures
   B. While Providing Justice to All Parties, Minimize Litigation Costs and Burden of Discovery in the United States

8. Next Meeting July 28, 2010 at 4:00 p.m.

Seventh Circuit Electronic Discovery Pilot Program
June 16, 2010 Committee Meeting Minutes

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1. Introduction of Committee Members

2. Subcommittee Reports
   - A. Education Subcommittee - Co-Chairs Mary Rowland and Kate Kelly
     - i. Kate Kelly led a discussion regarding the Education Subcommittee. A number of issues were discussed:
     - ii. The subcommittee is looking for additional content to add to the 7th Circuit website. Any additional content should be drafted by Committee members or the relevant subcommittee. The education subcommittee is not in a position to draft additional content.
     - iii. The subcommittee is in the process of developing a protocol for handling future webinars. Judge Holderman has asked Barbara Rothstein at the FJC who the Committee should be we dealing with on the webinar issue. Judge Holderman will follow up with the relevant person and determine whether the FJC could handle the Committee's future webinars. The initial response from Ms. Rothstein was that they would be happy to assist us. Judge Holderman will be in Washington D.C. on July 1, and he hopes to meet with the relevant person/persons from the FJC during that trip.
     - iv. If Committee members have materials, they should send them to Kate and Mary after reviewing them with the relevant subcommittee and in a final format ready for posting.
     - v. Judge Holderman asked if the materials Tim Chorvat is putting together for the ABA meeting in August could be added to the 7th Circuit website. Tim said they could, and they could be posted even before the meeting if they are final. He said that some of the items will be checklists.
     - vi. Sean Byrne stated that he is working on the glossary, but there is still some work to be done. He asked if any of the law firms would offer summer associate volunteers. Judge Holderman stated that he may be able to recruit some of the deferred attorneys who have been working in his chambers. Sean stated that volunteering for this should only involve a 2-4 hour commitment.
   - B. Early Case Assessment Subcommittee - Co-Chairs Karen Quirk and Tom Lidbury, and Preservation Subcommittee - Co-Chairs Jim Montana and Tom Lidbury
     - i. Karen and Tom provided an update on the subcommittees' activities and led a discussion on Principle 2.01.
     - ii. The ECA subcommittee met last Thursday, the preservation subcommittee met the day before.
     - iii. The big picture result from the meetings was that Principle 2.01 could be strengthened, but beyond that, the subcommittee felt it was premature to be revising principles at this time. The subcommittee also felt that adding commentary could make sense. The subcommittee plans to start with the Committee Reasoning from the Phase I report and add from there on several topics. A list of the topics the subcommittee thought would merit additional discussion was distributed to the members of the Committee. Judge Holderman asked the Committee members to look at the list and respond. Judge Nolan stated that she thinks the approach is terrific. She also asked whether it would make sense to include additional commentary on the e-discovery liaison provisions. The Committee discussed points that could be raised on those issues, including the fact that the liaison need not be an expert and could be a lawyer.

iv. On the issue of privilege logs, Judge Nolan raised the Facciola-Redgrave framework for addressing privilege log issues and making them simpler.

v. Jonathan Polich stated that he had drafted 3 Rule 26 reports today, and none of them really went into e-discovery in any detail. He is concerned that counsel frequently ends up kicking the can down the road on this issue. Counsel needs to come to the table and truly meet and confer on these issues.

vi. Karen Quirk asked whether the Committee could beef up Principle 2.01(c) to address this issue. Judge Nolan raised the possibility of making it stronger (must rather than may) and referring counsel to the webinar. The Committee also discussed the possibility of adding in the commentary specific issues to be discussed.

vii. Steve Teppler asked about search. He wants to change the language regarding search to make it more specific. Jennifer Freeman and Tom Lidbury noted that the subcommittee discussed adding specific examples to the commentary on Principle 2.05. The subcommittee will look at tweaking the language a bit to address the issue Steve Teppler raised.

viii. Judge Holderman stated that the two subcommittees should draft a proposed new principle and present it to the group. The Committee will vote by e-mail so that the revised principles can be ready to go by the end of June 2010 and up on the website by July 1 with changes from the Phase I principles highlighted.

ix. Tom Lidbury agreed to circulate revised versions of 2.01 and 2.05. He also agreed to add protective orders to the items to be discussed in Principle 2.01.

x. Subcommittee members mentioned that there was some concern in the Committee that the judges would prefer not to have protective orders mentioned, since protective orders are not appropriate in every case and there might be concern that this was some sort of suggestion that they were appropriate in every case.

xi. Judge Holderman stated that he does not object to including protective orders in the list of matters to be mentioned in 2.01(a), and the Committee agreed to add such a reference.

xii. Judge Nolan mentioned that Rule 502(d) orders are very underutilized, and Principle 2.01(a) provides another opportunity to educate the bar regarding use of such orders.

xiii. Sean Byrne stated that the feedback he's receiving is that where small companies are involved, they are telling counsel the talk re e-discovery is necessary. The principles can also be helpful for outside counsel in educating their clients.

C. Survey Subcommittee - Co-Chairs Joanne McMahon and Natalie J. Spears

i. Natalie Spears and Joanne McMahon summarized the status of this subcommittee's work.

ii. For Phase II, the Committee will be working exclusively with the FJC, and the FJC will also help in developing the survey. The plan is to conduct a baseline survey to assess general knowledge of certain e-discovery issues. The baseline survey will permit some form of comparative study at the end of Phase II. The baseline survey will go out to every ECF filer. The subcommittee has been speaking to Mark Tortorelli, the Court Systems Manager, about the procedural mechanisms for doing this.

iii. Judge Holderman asked Committee members to check with their respective firms to see whether there are any filters or other limitations preventing e-filers from getting these survey emails directly. Tom Lidbury stated that this had been an

issue at his firm, but the issue has been resolved. Natalie Spears stated that it is her understanding that at most firms, this is not an issue.

iv. The FJC has circulated a draft form of the survey, and Judge Holderman circulated that draft to Committee members.

v. Joanne McMahon stated that part of purpose of the baseline survey sent to all e-filers is to make sure we capture in our baseline the experience of judges and attorneys who have not been involved in the pilot program.

vi. Jennifer Freeman asked whether the subcommittee has considered whether to follow up with non-responders? Judge Nolan stated that she did not want to do this. She wants survey recipients to be confident their responses are anonymous. Natalie Spears stated that the program the FJC is planning to use can send out smart reminders re the survey (i.e., they only go to those who have not responded).

vii. A draft form of survey will be circulated to full Committee. Judge Holderman – wants to add a couple issues to the initial draft.

viii. Joanne McMahon stated that it is helpful to have the FJC administering this. It is better from a resource perspective and it helps ensure anonymity.

ix. Natalie Spears raised one additional comment that came from a Committee member who stated that they were having trouble finding the principles and standing order. Judge Holderman stated that he may recommend having a link to the principles on each district court's website. There would also be links to the standing order and commentary. Several Committee members and Judge Nolan suggested that the standing order be included as a separate document, not attached to the principles, with its own separate link.

x. Steve Teppler stated that we could also push the principles out to all e-filers. Natalie Spears stated that one concern is that, from a survey perspective, it is better to get the baseline survey out there first, before we have additional information/marketing about the principles themselves. Judge Holderman stated that the Committee will plan to conduct the baseline survey first, and then subsequently push the principles out to each e-filer in the NDIL and the other 6 districts. The communication will include links to the principles and standing order on the court's website.

D. Communications and Outreach - Co-Chairs Alexandra G. Buck and Steven W. Teppler

i. Alex Buck and Steve Teppler updated the Committee on the activities of the Communications and Outreach Subcommittee.

ii. The PB works site includes a list of volunteer presentation and speaking opportunities. Alex Buck stated that if Committee members want to be contacted for these opportunities, they need to act quickly.

iii. Steve Teppler discussed the recent ABA conference at which 2 magistrate judges conducted a mock 16(b) conference that included a discovery dispute and a spoliation dispute. They are receiving positive feedback from the presentation.

iv. The mock Rule 16 and 26(f) conferences from that meeting will be posted on the 7th Cir site. ALI-ABA has agreed to provide free of charge.

v. Judge Nolan stated that she is trying to recruit additional judges who are willing to participate in conferences and take speaking opportunities.

vi. Alex Buck stated that she still wants Committee members to send her all powerpoints and presentations. She will post them to the site so they are available to all Committee members.

3. Phase One 2010 Goals Met

A. Finalized Report

B. Presented Report on Phase One

i. The presentation at the Seventh Circuit Bar Association Annual Meeting and Judicial Conference was well received, as was the presentation at the Duke Civil Litigation Conference.

4. Phase Two

A. Duration of Phase Two July 1, 2010 – May 1, 2012

i. Judge Holderman stated that the consensus among subcommittee chairs was that a one year timeline for Phase II is too short. The Committee will provide an interim report in May 2011, but Phase II will not be completed until May 2012.

B. Modifications to Principles/Standing Order

i. Judge Holderman asked whether there were any other suggestions for revisions to the principles. Tom Lidbury will send out proposed language, and Judge Holderman will send an e-mail to Committee members asking if there are any objections.

C. Baseline Survey. See discussion above.

D. Participation of Judges

(1) E-mail Request

(2) Orientation/Training

Judge Nolan stated that one of the goals for Phase II is greater participation from Judges. She has recruited 9 additional judges already. She has 18 others she is contacting and hopes to convince to participate. She needs some help in this process. She needs a nice, succinct invitation to the Judges asking them to participate and inviting them to a simple orientation about how to get started. The e-mail would go out in 2 weeks. The Communications and Outreach Committee agreed to send out these communications.

The goal is to have 40-50 judges in the program. Judge Holderman pointed out that 50 judges would represent more than the majority of judges in the 7th Cir.

Jazmin Cheefus and Alison Walton volunteered to assist with these communications, along with Steve Teppler.

E. Committee Membership

(1) New Members

(a) Plaintiffs' Lawyers

(b) Indiana, Wisconsin, Southern Illinois

(c) Outside Seventh Circuit

Judge Holderman raised a new issue relating to recruiting of Committee members: recruiting new members from outside the 7th Circuit. The Committee had an extended discussion regarding how attorneys outside the 7th Circuit could participate and contribute. Judge Holderman stated that he hoped they would be able to encourage judges outside the 7th Circuit to look into and consider using the principles. There was a discussion about whether these additional attorneys would participate directly in subcommittee work. Judge Holderman stated that he is interested in having them participate. Judge Nolan raised the idea of a 2-tiered Committee structure. Joanne McMahon raised the practical difficulties with having remote attorneys participate directly in the Committee and the subcommittees. She also stated that there is great interest in what the Committee is doing.

Martin Tully raised the possibility of using Committee members who participate in conferences as ambassadors to spread the word to attorneys outside the 7th Circuit.

Judge Nolan stated that her preference is to help other districts organize their own committees rather than have them join this Committee. Sean Byrne asked who we are looking for as members. Judge Nolan stated that she wants workers, people who are willing to work and learn at same time.

Judge Holderman stated that he is convinced the group participating today will be the leaders of this effort going forward.

John Barquette, who is a member of the Committee from outside the 7th Circuit, and who was participating in the meeting by phone, weighed in. He thinks it is a good idea to add a group of attorneys from outside the 7th Circuit. Judge Holderman stated that Barquette is the type of person he had in mind when talking about attorneys outside 7th Cir.

Art Gollwitzer stated that as an attorney who recently moved from the 7th Circuit to Texas, he would like to participate in this effort.

Natalie Spears suggested there could be a formal subcommittee that would serve this role. There was also some discussion about making this part of the Communications and Outreach Committee.

Judge Nolan pointed out that there has been international interest as well. Simon Brown, an attorney from England, contacted the Judges about the Committee.

Judge Holderman stated that we should think about the best mechanism for doing this. Sean Byrne and Art Gollwitzer volunteered to act as liaisons to any Committee that forms on this issue. John Barquette stated that he thought this would be helpful. The Committee will consider the best mechanism for this.

(2) Inactive Status

Judge Holderman raised the issue of inactive members and what if anything the Committee should do about them. One Committee member suggested sending an e-mail to all members, or inactive members, asking them to opt in for Phase II. Joanne McMahon stated that there is some question out there about the expectations, what we want Committee members to do.

Judge Holderman and Judge Nolan have a philosophical difference on this. Judge Holderman is not as worried about inactive members.

One possibility: ask them to recommit. We could send a communication quantifying the level of commitment and requiring each member to join a subcommittee. "Asking if they wish to recommit and ask them what subcommittee they would like to join."

John Barquette raised the issue of adding academics as members of the Committee. Judge Holderman stated that his attempts to add academics from Chicago were unsuccessful. John Barquette named Professor Causey, Steve Kinsley, and a Dean at Stanford as academics who could be helpful on this because they have taught the issue at law schools. The problem is that law schools frequently do not teach discovery. Judge

Holderman stated that it is important to teach law students if we want to change the culture over time.

Ron Lipinski said Scott Carlson is currently teaching a class, and he will speak to him about participating in the Committee.

Steve Teppler raised the possibility of adding technology people to the Committee. He used the specific example of the CTO of a technology firm. Judge Holderman stated that he would like to have input from people in that sector. It could help lawyers understand the technology that's available. John Barquette is in favor of getting input from these people as well. He made a number of points about precision and recall and other issues. Jennifer Freeman stated that we are trying to encourage the discussion.

Steve Teppler reiterated that he thinks the Committee should have the storage industry in particular involved in the Committee.

Judge Holderman and Judge Nolan stated that the issue of whether to add technology people to Committee will be added to the agenda for July.

Jennifer Freeman and Sean Byrne volunteered to be co-chairs if a subcommittee materializes on this issue.

F. Webinars

Kate Kelley stated that the Education Committee has come up with a number of additional topics, but they are working on the logistics of getting the webinars scheduled and completed.

5. 2010-11 Goals
   - A. Expand Pilot Program Within and Beyond Seventh Circuit
   - B. Seventh Circuit Bar Association Annual Meeting and Judicial Conference - May 2011

6. Long Term Goals
   - A. Continue to Implement Effective Discovery Principles and Procedures
   - B. While Providing Justice to All Parties, Minimize Litigation Costs and Burden of Discovery in the United States.

7. Next Meeting July 28, 2010 at 4:00 p.m.

   Judge Holderman stated that prior to that meeting, there will be an e-mail vote on the revisions to the Principles and the revised Principles will be published to the website. He also stated that he believes the next two years will have a great impact on the process of discovery in the United States.

8. July 28, 2010

Seventh Circuit Electronic Discovery Pilot Program

July 28, 2010 Committee Meeting Agenda

1. Introduction of Committee Members

2. Subcommittee Reports
   A. Education Subcommittee - Co-Chairs Mary Rowland and Kate Kelly
   B. Early Case Assessment Subcommittee - Co-Chairs Karen Quirk and Tom Lidbury
   C. Preservation Subcommittee - Co-Chairs Jim Montana and Tom Lidbury
   D. Survey Subcommittee - Co-Chairs Joanne McMahon and Natalie J. Spears
   E. Communications and Outreach - Co-Chairs Alexandra G. Buck and Steven W. Teppler

3. Phase Two
   A. Duration of Phase Two July 1, 2010 – May 1, 2012
   B. Modifications to Principles (Attached)
   C. Standing Order (Attached)
   D. Baseline Survey
   E. Participation of Judges - over 35 judges from all districts in the Seventh Circuit
   F. Proposed Subcommittees
      (1) Technology
      (2) National Outreach
   G. Committee Membership

4. New Business

5. 2010-11 Goals
   A. Expand Pilot Program Within and Beyond Seventh Circuit
   B. Interim Phase Two Report - Seventh Circuit Bar Association Annual Meeting and Judicial Conference - May 15-17, 2011 in Milwaukee

6. Long Term Goals
   A. Continue to Implement Effective Discovery Principles and Procedures
   B. While Providing Justice to All Parties, Minimize Litigation Costs and Burden of Discovery in the United States

8. Next Meeting October 27, 2010 at 4:00 p.m.

9. November 3, 2010

Seventh Circuit Electronic Discovery Pilot Program

November 3, 2010 Committee Meeting Agenda

1. Introduction of Committee Members

2. Subcommittee Reports
   A. Education Subcommittee - Co-Chairs Mary Rowland and Kate Kelly
   B. Early Case Assessment Subcommittee - Co-Chairs Karen Quirk and Tom Lidbury
   C. Preservation Subcommittee - Co-Chairs Jim Montana and Tom Lidbury
   D. Survey Subcommittee - Co-Chairs Joanne McMahon and Natalie J. Spears
   E. Communications and Outreach - Co-Chairs Alexandra G. Buck and Steven W. Teppler

3. New Subcommittee Reports
   A. Admissions - Liaison Moira Dunn
   B. National Membership - Liaison Art Gollwitzer
   C. Website - Developers Chris King and Tim Horvath
   D. Technology Subcommittee - Co-Chairs Jennifer Freeman and Sean Byrne

4. New Business

5. 2010-11 Goals
   A. Participation of Judges
   B. Additional Courts
   C. Phase Two Interim Report to be presented at the Seventh Circuit Bar Association Annual Meeting and Judicial Conference in Milwaukee, May 16-17, 2011

6. Long Term Goals
   A. Continue to Implement Effective Discovery Principles and Procedures
   B. While Providing Justice to All Parties, Minimize Litigation Costs and Burden of Discovery in the United States

7. Next Meeting

Seventh Circuit Electronic Discovery Pilot Program
November 3, 2010 Committee Meeting Minutes

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1. Introduction of Committee Members – meeting began at 4:05 p.m.
   - A. Introductory remarks: Judge Holderman
     - i. Introductions by all and new members
     - ii. Thank you for your continued participation on the Committee and generous contribution of your time. I believe that we have an opportunity to drive reform in the way discovery is conducted in cases nationwide.
   - B. Judge Nolan's remarks
     - i. If you are joining the Committee or have changed firms, please contact Peggy Winkler (J Holderman's assistant) to provide contact information.
2. Subcommittee Reports
   - A. Education Subcommittee - Co-Chairs Mary Rowland and Kate Kelly
     - i. K. Kelly: Reported that the webinar production is in full swing. We held two webinars in 2009.
       - a. John Redgrave will be presenting a live webinar on Jan 18, 2010, 3 to 5 p.m. in the Judge Parson's courtroom. Topics will be: preservation, proportionality and privilege logs. Encourage other members of your firms to attend.
       - b. Recorded and offered on the Seventh Cir Bar Website.
       - c. Additional webinars to be created on basic e-discovery issuses, and goal is early December. Webinar is being created by Merrill Corporation (donated effort).
       - d. Looking for new members for case review updates.
       - e. George Bellas offered to work with the Committee to discuss the Indiana outreach and on the webinar.
       - f. Judge Nolan requests further volunteers to assist the Committee in identifying the cases in our Circuit and reporting on them.
   - B. Early Case Assessment Subcommittee – Co-Chairs Karen Quirk and Tom Lidbury
     - i. T. Lidbury: Reported that the Subcommittee met several times and decided not to add new principles. There was a strong consensus that the principles were in good shape. The Subcommittee determined it would not finalize or publish the committee notes at this time. While several thought the Subcommittee's analysis would assist counsel and clients, we determined that we would like to allow the case law develop the commentary. The draft commentary is in good shape, but we did not achieve an overall consensus on several points.
     - ii. Judges Holderman and Nolan and the Committee of the Whole agreed with the strategy.
   - C. Preservation Subcommittee – Co-Chairs Jim Montana and Tom Lidbury (same as above)
   - D. Survey Subcommittee – Co-Chairs Joanne McMahon and Natalie J. Spears
     - i. J. Nolan: this week Crain's Chicago Business picked N. Spears for an honor. She was asked in the column to explain how she was contributing to Chicago's business landscape. N. Spears said that one of the most important things she was doing right now was being part of this Committee.
     - ii. J. McMahon: We provided the results of our survey and report at the last meeting. The report helped us identify a baseline.
       - a. FJC baseline survey was circulated throughout the circuit attempting to identify what the attorney's experience has been with e-discovery. We hope to compare this data after the next phase is completed. Has the experience improved?

b. 22,000 survey recipients; 6,800 responses.
c. What is your area of practice area, e-discovery
d. Cooperative – 70-80%
e. Rarely or never deal with e-discovery is about 20%
f. Knowledgeable – 70% and a lot of variance on "proportionality"

iii. J. McMahon: Decision to wait to give the principles time to impact future survey results.

iv. J. Nolan: Phase II will take about two years. J. Holderman: next survey in 2012 by FJC (Federal Judicial Center)

E. Communications and Outreach – Co-Chairs Alexandra G. Buck and Steven W. Teppler

i. A. Buck: Opportunities to assist:

a. Fourth Annual E-discovery Summit Feb 14 – 16 in New York
b. E-Discov for Pharma in Boston – March 28-29 in Boston
c. Need follow-up for Committee Members: did you speak or what happened at the seminar. Need to update the general e-mail list.
d. J. Nolan: we need to get invited – contact the C&O committee to let folks know about the opportunity to speak so that we can have other members of the Committee speak;
e. A. Buck: T. Solis' law review article for Northern Illinois Law School was mentioned. If you have spoken in the last 6 months and keep the collateral material; provide it to the committee; Google report – a lot of press – PBworks website: advertisements to be re-routed to everyone.
f. Law.com: article; send the info to the Outreach committee
g. E-Discovery by IQPC: Analyzing the Findings of the 7th Circuit eDiscovery Pilot Program conference to be held on December 7, 2010 in New York. Get information at info@iqpc.com
h. Duke Report: J. Holderman was there and the Pilot Program was cited as a catalyst to change the course of discovery. Whole report will go on the site. Tom Allman writes about the Committee's work at Sedona, as well.

3. New Subcommittee Reports

A. Admissions – Chair Moira Dunn

i. M. Dunn: Currently about 90 members. We wanted to make sure that we're getting in the new admissions and potentially prepare a form to learn more about the Committee; I can be the greeter for the Committee. Our hope is that attorneys do not join just to put it on their resume. We would like to encourage active participation. Looking for assistance as co-chair.

ii. Mike Gifford agreed to assist as co-chair.

iii. J. Holderman: We do not want to artificially limit the size of the Committee. Physical size or location of the member should not be a deterrent for membership.

iv. M. Dunn: We are creating a Packet containing the Principles, a contact list and the Phase 1 materials, and a link to get that information and coming in caught up, including meeting minutes.

B. National Involvement – Co-chair Art Gollwitzer

i. A. Gollwitzer: What does the National group do that the C&O committee does not do? Texas put on an advanced patent law presentation which dealt with e-discovery – but no mention of the 7th Circuit Program; Should we be reaching out to other courts? 5th Circuit's meeting – should we split up the work?

ii. J. Holderman: I've been appointed the chair of Judge's committee that is a part of the Fed Judges Bar. We are encouraging participation by members of that committee on ours. Yes, we should continue our outreach program.

iii. J. Nolan: please forward the ideas for this outreach and involvement program to Art.
iv. DRI: Defense Research Institute – 23,000 members nationally to gain involvement.
v. K&L Gates: David Cohen – e-discovery website involvement or cross mention of the Committee's work.
vi. Plaintiff Counsel Associations: involvement should be encouraged.
vii. Legal Aid involvement should be encouraged.
viii. J. Nolan: We need more requesting parties to be involved in the Committee.
ix. J. Nolan: Asked whether we should continue to have separate subcommittees for Admissions and National Involvement? J. Holderman: Yes.

C. Website Development – Co-Chairs Chris Tang and Tim Horvath
i. T. Horvath: The 7th Cir. Bar Association has a presence for us now; but looking at creating a centralized place for getting information about the Committee and have site that has some pizzazz.
a. Concept: main page that would provide basic information about the program; principles; goals; courts involved; webinars; committee notes; standing order; list of cases; roster of members;
b. Web site committee can then link to other sets of pages for each subcommittee to have or a group of pages and content to be provided and post it. Word press or some other tool. Make it easy to get the content up but uniform look to the pages; latest information;
c. C. Tang: exploring the logistics side, where we'd host it; payment; Domain names registered; ideas being discussed on how to do this. Have you picked any domain names?
d. J. Holderman: Offered some names: "DiscoveryPilot" – "eDiscoveryPilot" and "7thCircuitPilot" are also secured by committee member S. Teppler and can do re-directs on those names.
e. J. Nolan: Appreciative of the 7th Cir Bar Association's assistance and added that we need to have a standalone web site. The web site can join all of us. Responsibility is not on the court. Committee Chairs will run the web site.
f. J Holderman: Mentioned possible connections with website designers to assist in this effort and other opportunities are being explored.
g. Timing: Jan 1? Committees to determine soon what content you want up on the web site now. C. Tang and T. Chorvat to keep this focused.

D. Technology Subcommittee – Co-chairs Jennifer Freeman and Sean Byrne
i. J. Freeman: focus on the technology associated with the e-discovery process
a. Every time we talk about it, how do we make it better?
b. You can't mention a product in certain conferences without being in a "sales" mode;
c. We would like to have a report or page on the website describing the types of searches and tools and the terminology for such tools and Judges can look at them.
d. Group that compile these tools and simplify the explanation.
e. Technology partners can be "advisors" to this committee. Work with the thought leaders, and bring the information to the committee to filter.
f. EDRM: types of different enterprise content management systems; storage; visualizations on each; concept clustering; topic groupings; visualize these items; white papers on latent semantic analysis; Sedona;

ii. S. Byrne: Not just technologists but include the end users that deal with the tools on a daily basis. Deliverables:
   a. Technology Matrix – tell a practitioner these are the types of technologies that can help; not product specific.
   b. Education Group – technology specific terminology.
   c. Tools to reduce cost and risk
   d. Coordinating with the web site – and allow granular educational opportunities to learn from the basics to much more advanced tools
   e. Liaison's assistance in education to the judges
   f. Court will not endorse a particular piece of technology
   g. Feels the technology should be "out there" for everyone to know how these tools work. M. Dunn emphasized this point. J. Freeman mentioned that your e-discovery timeline can get missed if you do not understand the technology.
   h. S. Teppler recommended opening a controlled and structured avenue to educate the Committee as a whole but not to allow technology vendors to run the subcommittee. Strongly seconded by many members of the Committee.
   i. J. Holderman: Knowledge of the advances in the technology is key to understanding the issues; we need to provide the educational information on these issues; definitional aspects of terms and not to promote a specific tool.
   j. M. Willenson: Can use a cloud review tools? How would that be treated? Especially if you do not have Summation or Concordance and load file type issues;
   k. J. Nolan: Very interested in sharing this subcommittee's product: include a seminar or interactive piece to the technology - three-dimensional.

iii. K. Quirk: keeping it separate from education?
   a. M. Tully: Glossary is needed. Many of us are not as well versed like Craig Ball's analysis of how PSTs work and what happens to email. Critical to have technologists.
   b. J. Nolan: I liked the idea of the internal advisors that are not necessarily part of the large Committee that could be specialists – so this may be a good way to balance the overall committee.
   c. K. Quirk: Advocates for certain technology? Could take away what we put out as principles – we have to coordinate with Education Committee.

iv. J. Nolan: would like to know how some of the tools work – on privilege review for example and encourage law clerks to know how these tools work.

v. Strong consensus to continue to build on the subcommittee's model and getting information on how the various tools and techniques work.

4. New Business
5. 2010-11 Goals

A. Participation of Judges in the Pilot Program – J. Nolan
   i. 3 states; 43 judges; 1 bankruptcy judge; our goal is to get 10 more judges this year.
   ii. We are talking about training judges and the law clerks – more opinions coming out soon.
   iii. At Sedona – possibly FJC would use us to help them.

B. Additional Courts
    i. Other judges should know what we are doing – D. Waxey in KS is very interested in knowing what is going on here.
C. Phase Two Interim Report to be presented at the Seventh Circuit Bar Association Annual Meeting and Judicial Conference in Milwaukee, May 16-17, 2011
    i. J. Holderman: it will be a break out session and an interim report – no new survey.

6. Long Term Goals
    A. J. Holderman: Continue to implement effective discovery principles and procedures:
    B. I recommend to other chief judges they need active interested people in the bar to participate and we will change how litigation is handled in the U.S.
    C. While providing justice to all parties, minimize litigation costs and the burden of discovery.
7. Next Meeting – January 12, 2011 at 4:00 p.m. in Room 2504, Dirksen Bldg. Thanks to all and the meeting was adjourned at 6:00 p.m.

10. January 12, 2011

Seventh Circuit Electronic Discovery Pilot Program

January 12, 2011 Committee Meeting Agenda

1. Introduction of Committee Members

2. Subcommittee Reports
   A. Education Subcommittee - Co-Chairs Mary Rowland and Kate Kelly
   B. Early Case Assessment Subcommittee - Co-Chairs Karen Quirk and Tom Lidbury
   C. Preservation Subcommittee - Co-Chairs Jim Montana and Tom Lidbury
   D. Survey Subcommittee - Co-Chairs Joanne McMahon and Natalie J. Spears
   E. Communications and Outreach - Co-Chairs Alexandra G. Buck and Steven W. Teppler

3. New Subcommittee Reports
   A. Membership - Co-Chairs Moira Dunn and Mike Gifford
   B. National Membership - Liaison Art Gollwitzer
   C. Website - Developers Chris King and Tim Chorvat
   D. Technology Subcommittee - Co-Chairs Jennifer Freeman and Sean Byrne

4. New Business

5. 2011 Goals
   A. Participation of Judges
   B. Additional Courts
   C. Phase Two Interim Report to be presented at the Seventh Circuit Bar Association Annual Meeting and Judicial Conference in Milwaukee, May 16-17, 2011

6. Long Term Goals
   A. Continue to Implement Effective Discovery Principles and Procedures
   B. While Providing Justice to All Parties, Minimize Litigation Costs and Burden of Discovery in the United States

7. Next Meeting

Seventh Circuit Electronic Discovery Pilot Program

January 12, 2011 Committee Meeting Agenda and Minutes

1. Introduction of Committee Members

2. Subcommittee Reports

A. Education Subcommittee - Co-Chairs Mary Rowland and Kate Kelly

3 upcoming events. Jonathan Redgrave speaking 1/18 (427 signed up, will be taped and then on website; 4 "p"s of e-discovery). Another 418 signed up and Redgrave will be coming back. Another program – Basics of E-Discovery (in conjunction with Merrill, webinar). Christina Zacharias, with Inventis, went through all 7th Circuit cases on e-discovery and summarized them in writing for publication on the web site.

B. Early Case Assessment Subcommittee - Co-Chairs Karen Quirk and Tom Lidbury

No new developments to report.

C. Preservation Subcommittee - Co-Chairs Jim Montana and Tom Lidbury

No new developments to report.

D. Survey Subcommittee - Co-Chairs Joanne McMahon and Natalie J. Spears

The only new development to report was a rules amendment adopted by the Wisconsin Supreme Court. They adopted e-discovery rules and included mandatory meet and confer. There was a dissenter who said that mandatory meet and confers don't work and attempted to use the Pilot Program's Phase 1 survey results to support that conclusion. Wisconsin members of the Pilot Program Committee will work to address this misperception of our findings. One opportunity may be at the 7th Cir bar association meeting in Milwaukee on 16th/17th May.

Judge Nolan noted that the next big project of this committee will be the Phase II Survey which will be compiled with assistance by FJC. The survey committee's work will begin in the fall in order to be prepared to send out surveys in Spring 2012. The Phase II survey questions are expected to be more detailed and yield fruitful information based on the fact that the Principles have been in use in more cases and for a longer period of time.

E. Communications and Outreach - Co-Chairs Alexandra G. Buck and Steven W. Teppler

The subcommittee described the general format of the two types of informational packages that will be sent out – the judge's package and the practitioner's package. Discussion of this subcommittee's work blended with the discussion of the web site. Alex mentioned an article that Inside Counsel magazine is doing on proportionality.

3. New Subcommittee Reports

A. Membership - Co-Chairs Moira Dunn and Mike Gifford

The subcommittee has prepared a draft letter to new members (may overlap with work of the communications subcommittee; respective chairs to talk and coordinate their actions)
Technology advisers will not be complete members of committee (per discussion with Sean Byrne)
Refer potential new members to Mike or Moira as opposed to Judges Holderman and Nolan but Mike and Moira need to contact Gabi Kennedy and Peggy Winkler in Judge Holderman's office to let them know of any new members)

B. National Membership - Liaison Art Gollwitzer)

Alex and Art are in communication
Art is reaching out the NFJE (National Foundation for Judicial Excellence)
If anyone sees articles on ESI that don't mention us, let Art know.
Art is reaching out to anyone who does programs on ESI

C. Website - Developers Chris King and Tim Chorvat

Goal is to get it up and live asap, preferably early March.
Demo of web was well received. Several suggestions were made re how to improve and simplify. Judge's corner, crowdsourcing, blogging, tweeting, and Facebook discussed. While issue of keeping content fresh was raised, there was significant support for using all available avenues to push content out in the manner that people now work. All comments should be provided to the developers by January 21, 2011. Judge Nolan will get the Law Bulletin and all the relevant bars to announce this when the website is ready. Anne Kershaw has given permission to use her book and this may be one item of content on the website.

D. Technology Subcommittee - Co-Chairs Jennifer Freeman and Sean Byrne

Sample is not ready yet. Will be ready in March.

4. New Business

Chris King presented an e-discovery mediation program idea he developed. When a judge comes across a discovery dispute, there would be a panel of volunteer lawyers available to act as mediators at no cost to the parties. Details to be worked out. All sectors would need to be represented on mediation panel. Minimum hours commitment of volunteers to be decided.

5. 2011 Goals

A. Continuing Our Education and Outreach Programs
B. Participation of Judges
C. Additional Courts
D. Phase Two Interim Report to be presented at the Seventh Circuit Bar Association Annual

Meeting and Judicial Conference in Milwaukee, May 16-17, 2011

6. Long Term Goals

A. Continue to Implement Effective Discovery Principles and Procedures
B. While Providing Justice to All Parties, Minimize Litigation Costs and Burden of Discovery in the United States

7. Next Meeting March 9, 2010 Room 2544A again

11. March 9, 2011

Seventh Circuit Electronic Discovery Pilot Program

March 9, 2011 Committee Meeting Agenda

1. Introduction of Committee Members

2. Subcommittee Reports
   A. Education Subcommittee - Co-Chairs Mary Rowland and Kate Kelly
   B. Early Case Assessment Subcommittee - Co-Chairs Karen Quirk and Tom Lidbury
   C. Preservation Subcommittee - Co-Chairs Jim Montana and Tom Lidbury
   D. Survey Subcommittee - Co-Chairs Joanne McMahon and Natalie J. Spears
   E. Communications and Outreach - Co-Chairs Alexandra G. Buck and Steven W. Teppler
   F. Membership - Co-Chairs Moira Dunn and Mike Gifford
   G. National Membership - Liaison Art Gollwitzer
   H. Technology Subcommittee - Co-Chairs Jennifer Freeman and Sean Byrne
   I. Website - Developers Chris King and Tim Chorvat

3. New Business
   A. Phase Two Interim Report to be presented at the Seventh Circuit Bar Association Annual Meeting and Judicial Conference in Milwaukee, May 16-17, 2011
   B. April 6, 2011 Merrill Webinar
   C. Volunteer Electronic Discovery Mediation Program

4. 2011 Goals
   A. Continuing Our Education and Outreach Programs
   B. Participation of Judges
   C. Additional Courts

5. Long Term Goals
   A. Continue to Implement Effective Discovery Principles and Procedures
   B. While Providing Justice to All Parties, Minimize Litigation Costs and Burden of Discovery in the United States

6. Next Meeting

Seventh Circuit Electronic Discovery Pilot Program
March 9, 2011 Committee Meeting Minutes

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1. Introduction of Committee Members – The meeting began at 4:05 p.m.

   A. Introductory remarks: J. Holderman
      i. J. Holderman thanked everyone for attending and their work.
      ii. The Program's Phase II interim report to be provided in Milwaukee for the Seventh Circuit Bar Association Meeting to be held in May.
      iii. Introductions were held – over 35 lawyers in attendance in person or via conference call.

   B. Judge Nolan's remarks: J. Nolan thanked everyone for attending and expressed her gratitude for all of the work of the Committees have done leading to this point.

2. Subcommittee Reports

   A. Education Subcommittee - Co-Chairs Mary Rowland and Kate Kelly

      a. M. Rowand/K. Kelly: The January 18, 2011 seminar on E-discovery by John Redgrave held in the ceremonial courtroom overflowed into spare courtroom. Over 300 people were on a waiting list to get in. 1.75 CLE free hours.
      b. M. Rowand: Next educational event to be held on April 6, 2011, on the Mechanics of ESI. Being taped but not yet available.
      c. Merrill Corporation and Mark Rossi to provide technical advisory services and the host the webinar; Heidi Fessler (Merrill), Ron Lipinski (Seyfarth) and Dan Graham (Clark Hill) will present the material in a panel format. The course will provide materials with the most recent case law from our jurisdiction as well.
      d. J. Holderman stated that we appreciate the efforts to put together the webinar. J. Holderman taped the introduction to the webinar on the Mechanics of e-discovery.
      e. J. Nolan requested availability of the powerpoint slide decks for each presentation on the current website.

   B. Early Case Assessment Subcommittee – Co-Chairs Karen Quirk and Tom Lidbury

      i. T. Lidbury: No ongoing projects at the moment but submitted content for the website.

   C. Preservation Subcommittee – Co-Chairs Jim Montana and Tom Lidbury (same as above)

   D. Survey Subcommittee – Co-Chairs Joanne McMahon and Natalie J. Spears

      i. J. McMahon: active survey phase is over but will be reactivated over the next several months. J. Holderman will provide the initial survey results for the Seventh Circuit Interim report.

      ii. J. Nolan: Asked whether the subcommittee intended to provide the results of the baseline survey from the 6,000 respondents? J. McMahon suggested not to put

the baseline results out there yet. J. Nolan wanted the fact that the survey had the FJC's input and that 6,000 people answered the survey to be publicized.

iii. J. Holderman: All agreed to get the information that the baseline survey and FJC's involvement and will be available in the Phase II part of the process. All agreed not to release the answers to the questions in order to avoid potential spoiling of the Phase II survey results.

E. Communications and Outreach – Co-Chairs Alexandra G. Buck and Steven W. Teppler

i. Chairs not available today. J. Holderman indicated that the outreach efforts were ongoing. He asked all attendees to please provide the program details for speeches you've done (date, topic, etc.) so that the Outreach Committee can report to prepare the Interim Report. Email them to A. Buck and S. Teppler, **within two weeks of today.** For all conferences up to May 1, 2011.

F. Membership – Chair Moira Dunn/Mike Gifford

i. M. Gifford stated that the committee prepared a "Welcome to the Committee Letter" that may need to be retailored to incorporate the website. Determining how membership will be presented on the website and coordinating it with the materials will be our next mission.

G. National Involvement – Chair Art Gollwitzer

i. A. Gollwitzer: We provided information for the website, including contact information, as well as the membership package. We looked at recruitment of authors of articles regarding ESI and told them about our work. We asked that they spread the word on what the Pilot Program is attempting to do.

ii. We approached the authors of the Law 360 article on ESI and we have approached speakers on ESI.

H. Website Development – Co-Chairs Chris King and Tim Horvath

i. C. King: When is the site to go-live? Answer: **April 9, 2011.** Still work to be done and Justia has been assisting with the site development. Basic design was shown on screens in the Committee meeting for all to see and comment on. Questions regarding whether we should create additional tabs, etc. were solicited. The specific subcommittees are to decide what content to put up on the site relating to their mission. The draft site is on a link circulated to the Committee by email.

ii. T. Horvath walked through the pages and C. King explained the tabs and the upcoming sections of the site.

iii. J. Nolan: We listed 9 subcommittees and we want the subcommittees to list Early Case Assessment. I would like ECA to be part of the preservation subcommittee and add another link. Technology subcommittee will be added.

iv. M. Gifford: Suggested materials be added to communications and outreach.

v. S. Byrne: Add to Resources link cases and speakers.

a. Extra Tab for Home is not necessary

b. Social Media and possibly add blog that could affect items and new cases and new members to the committee and upcoming meetings. Others commented that there could be a "share" option.

c. J. Holderman: Who would be blogging? We don't want others to be placing information on our website unless it goes through our group.
d. C. King: We don't have a full time webmaster. It may be difficult to cover a blog and some of these suggestions until Phase II. The subcommittee would be updating the recent activity and expanding the scroll to bring new cases on line.

vi. R. Lipinski: We want to keep it simple. The case law that should be gotten to quickly and easily. Many echoed these comments.

vii. K. Kelly: Judge Scheindlin and Judge Grimm cases would need to be on the "cases" in addition to a 7th Circuit cases drop down menu.

viii. J. Nolan: Will Resources would be part of Education tab? Answer – yes.

ix. C. King: We will have a separate subcommittee page that may have additional links. Education subcommittee is to put together the links.

x. M. Dunn: Questioned whether we would put the names of all committee members on the site with email addresses? Or, just a list of other contact information?
a. C. King: Need two separate pages for the Membership Committee – one about the committee itself; and the second how to become a member.
b. Gifford: We can update the membership list without difficulty. Eliminate the email addresses to avoid being bombarded by junk email.
c. J. Holderman: We want to avoid the email addresses for now. With our current listing, we have to consider this. Each committee can decide on who to "contact" for now.

xi. Justia: Tim: Keep it simple and we can easily put in the social media and blog too. We want to make sure that the website is easily navigable.

xii. J. Holderman: We can adjust it later? Justia – Yes. Justia was roundly applauded for their flexibility and help on the development of the site.

xiii. J. Nolan: How do the co-chairs get new information on the website? Justia: You can give it us via email and we will put it up in 24hrs. Or we can give web-based interfaces for the individual access to the sites to subcommittee chairs. We can set up the email address to send the material to. Takes about an hour to upload information.

xiv. C. King: In the news? Or should be eliminate the duplication? We want to keep it in both places to generate publicity for the Committee's activities.
a. J. Holderman: "News" tab would be used.

xv. C. King: Speaker's Bureau – to provide a list of speakers and the Outreach Committee should be propagating this tab. Explained the Survey tab for the current information available.

xvi. J. Holderman: please provide additional details to the Website committee.

I. Technology Subcommittee – Co-chairs Jennifer Freeman and Sean Byrne

i. J. Freeman: We are working on the deliverable for XML file (a copy of which was printed for the Committee's review today) and to provide to the web group to edit and incorporate online. EDRM reference model and the chart of issues will be provided. Meet and Confer on collection and what does that mean, the technology involved and the benefits and pitfalls for the issue. We will provide a technology listing for the collection step too.

ii. J. Freeman: We will hyperlink the information as well. We are dividing the sections among the technology leaders to assist us in answering these questions.

Allows questions to be printed for each part of the case. We thought of these issues in the ECA committee and now have some of the specific technologies involved in it. We want it comprehensive and agnostic and nothing else like it.

iii. S. Byrne: Justia will be providing us technical requirements. Glossary will use the definitions adopted across the website, including the checklist for the meet and confer that have been used in courts.

3. New Business
   A. Phase II Interim Report: Second Day Morning Program
      i. We want to have a written interim report – on the CD that is passed out to attendees.
      ii. J. Nolan's timetable: Tom Lidbury and Karen Quirk to spearhead the Interim Report. What your committee has done up to May 2011 and 1 page summary from each subcommittee to be sent to them by **March 30**; Tom and Karen to get the report to J. Nolan by **April 13** with an introduction and conclusion, and last meeting will be **April 27, 2011**, in this room.
      iii. J. Holderman: We will review the draft interim reports during the week of April 18 to finalize the Interim Report by April 28.
      iv. J. Holderman: If we can have the website up by May 1, then we can display it by mid-May by the Annual Meeting and may even have a live display of the website at the meeting in Milwaukee. The website subcommittee indicated that the first version of the website should be up three weeks before J. Holderman's suggested date.

4. 2011-12 Goals

   A. Continuing our Education and Outreach Programs.

      i. Participation of more Judges in the Pilot Program – J. Nolan

   B. April 6, 2011 Webinar on the Mechanics of Electronic Discovery. J. Holderman: Webinar – being taped on March 14. Thanked Merrill for all of its work on the project.

   C. Additional Courts
      i. Phase Two Interim Report to be presented at the Seventh Circuit Bar Association Annual Meeting and Judicial Conference in Milwaukee, May 16-17, 2011
      ii. Recruitment of additional courts.

5. Long Term Goals

   A. Continue to Implement Effective Discovery Principles and Procedures while providing justice to all parties, minimize litigation costs and burden of discovery in litigation in the United States.
   B. Volunteer Mediation Program: J. Nolan explained that some judges are aware of this effort, including J. Shenkier/J. Denlow.
      i. C. King does not have an elements document yet.
      ii. At least three firms were asked to provide volunteer mediators and a limited number of judges will try this on a small scale and see how it works, and work to get the bugs out. Four firms volunteered: C. King of SNR Denton; Jeff Shaer and Debra Bernard of _____; Daniel Rizzolo of _____; and R. Lipinski –

Seyfarth. Others may be asked to assist and a number of other firms expressed interest in helping the program.

C. J. Nolan: One of the Phase II goals was to conduct outreach to Indiana and Wisconsin. Rich Moriarity (WI) helped organize a program held in Milwaukee, Wisconsin. Chief Judge Clavert assisted in presenting a program to approximately 50 lawyers on dealing with ESI problems. Now, the road show is off to Madison and Peoria in the Fall. Indiana is coming up. This is a real way to spread the word. For the first time, no one stood up and said we don't have e-discovery issues in our cases.

D. J. Holderman thanked and praised those involved in organizing the outreach and heard that it was very well received in Milwaukee. These programs can be duplicated anywhere. Solid two hour format and received CLE credit, as well.

E. Further Long Term Goals: J. Holderman believes we are changing for the better the pretrial process.

6. Next Meeting – **April 27, 2011 at 4:00 p.m. in Room 2504.** Meeting concluded at approximately 5:45 p.m.

Draft minutes prepared by Dan Graham.

12. April 27, 2011

Seventh Circuit Electronic Discovery Pilot Program

April 27, 2011 Committee Meeting Agenda

1. Introduction of Committee Members

2. Subcommittee Reports
   A. Education Subcommittee - Co-Chairs Mary Rowland and Kate Kelly
   B. Early Case Assessment Subcommittee - Co-Chairs Karen Quirk and Tom Lidbury
   C. Preservation Subcommittee - Co-Chairs Jim Montana and Tom Lidbury
   D. Survey Subcommittee - Co-Chairs Joanne McMahon and Natalie J. Spears
   E. Communications and Outreach - Co-Chairs Alexandra G. Buck and Steven W. Teppler
   F. Membership - Co-Chairs Moira Dunn and Mike Gifford
   G. National Membership - Liaison Art Gollwitzer
   H. Technology Subcommittee - Co-Chairs Jennifer Freeman and Sean Byrne
   I. Website - Developers Chris King and Tim Chorvat

3. New Business
   A. Phase Two Interim Report to be presented at the Seventh Circuit Bar Association Annual Meeting and Judicial Conference in Milwaukee, May 16-17, 2011
   B. Report on ESI Program "Principles and Practical Application" in Madison, Wisconsin, on April 11, 21011
   C. Report on April 6, 2011 Merrill Webinar

4. 2011 Goals
   A. Continuing Our Education and Outreach Programs
   B. Increasing the Participation of Judges
   C. Additional Courts

5. Long Term Goals
   A. Continue to Implement Effective Discovery Principles and Procedures
   B. Providing Justice to All Parties While Minimizing the Cost and Burden of Discovery in Litigation in the United States

6. Next Meeting

Seventh Circuit Electronic Discovery Pilot Program
Summary of Committee Meeting
April 27, 2011

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1. Introduction of Committee Members

A. Judge Nolan asked each of the members attending in person or by phone to introduce themselves. The members attending by phone included Randolph Barnhardt (Denver), Karen Koppa (city of Chicago), Art Gollwitzer, Carina Geraghty, Griffith (W. Va. Firm), Jamie Jotson (?) (Pennsylvania), Pauline Levy, Karen Quirk, Deborah Richard (SD Ind. AUSA), Jeff Sher (Sidley Austin), Marni Wilkenson, and Allison Walton.

B. Judge Nolan asked new members to contact the membership committee for more information on the committee and how to get more involved. Judge Nolan asked members to contact Peggy Winkler or Gabi if there are errors in, or changes needed to, their information as listed in the Draft Phase 2 report.

2. Subcommittee Reports

A. Education Subcommittee – Co-Chairs Mary Rowland and Kate Kelly. Kate Kelly provided a status on the subcommittee's work.

i. The subcommittee had a wonderful webinar with Merrill in last couple weeks. For this webinar, notice went out through ECF to all three states – Illinois, Wisconsin, and Indiana. About 2,000 lawyers clicked in.
ii. Merrill is willing to do this again for CLE credit in any of those three states. The program lasted 90 minutes. The participant limit was originally 1500, but Merrill increased that number to accommodate the increased interest.
iii. Mary Rowland took care of the live event involving Jonathan Redgrave. We hope to do another in person event, possibly involving Jonathan Redgrave again.
iv. Illinois MCLE does not permit credit for group listens to webinars.
v. Heidi Fessler from Merrill acted as the moderator, and she was very good.
vi. The subcommittee is soliciting suggestions from committee members for additional topics for webinars.

B. Early Case Assessment Subcommittee – Co-Chairs Karen Quirk and Tom Lidbury. Tom Lidbury provided an update. Other than assisting with the drafting of the Interim Report, this subcommittee has been inactive.

C. Preservation Subcommittee – Co-Chairs Jim Montana and Tom Lidbury. This subcommittee has also been inactive.

D. Survey Subcommittee – Co-Chairs Joanne McMahon and Natalie J. Spears. Natalie Spears reported that there is nothing new to report from this committee.

E. Communications and Outreach – Co-Chairs Alexandra G. Buck and Steven W. Teppler. Neither Steve nor Alex was able to attend the meeting.

i. Judge Nolan reminded members that Alex has put together for the website a list of all speaking engagements. There were 50 in the last year. Judge Nolan reminded members that they needed to be self-reliant on this issue: when you speak, contact Alex and Steve directly and provide them with the date, topic, and location.

ii. Steve is developing a new judge packet. It will not be included on the website. Rather, it will be part of a letter to new judges.

iii. Judges Holderman and Nolan will be speaking to judges at the Seventh Circuit Bar Association conference, hoping to get additional judges to participate.

F. Membership – Co-Chairs Moira Dunn and Mike Gifford. Mike Gifford provided an update.

i. Since the last meeting, the subcommittee has received referrals from 6 possible new members. He is working on getting out confirmation letters to each new member.

ii. It is important for each new member to contact the membership subcommittee and provide contact information and a list of committees in which they may wish to participate.

G. National Membership – Liaison Art Gollwitzer. Art Gollwitzer led a discussion of issues relating to national membership.

i. Out of state members should also contact and work through the standard membership committee. This committee has been more focused on national outreach than membership. Art stated that he has been coordinating with Alex Buck from the Communication Subcommittee and spreading the word about the principles.

ii. Art stated that when he sees articles about e-discovery, he attempts to contact the author to confirm that he or she is aware of that committee, and to make sure that person considers mentioning our project if they speak on e-discovery issues again. Art asked that members contact him if they see additional articles and he will follow up with the authors.

iii. Art had a conversation with Rick Richardson and discussed other ways of organizing the national outreach effort. One possibility is circuit coordinators: finding one person in each circuit who could spread the word, work on outreach, and report back to the subcommittee (and the committee) when the Principles are being used.

iv. In addition, anyone who speaks at a seminar should send Art the dates and he will add that to the list. He is trying to avoid seminars that are for profit.

v. Art reported that in one of his cases, he essentially used the principles as a template for a scheduling order entered in a federal case in California.

vi. Judge Nolan reported that Ms. Griffith offered to be 4th Circuit rep.

vii. The committee did some further brainstorming about what national outreach means. Ultimately, it would be helpful to have people spread across the country. As we add people, we should let the Federal Judicial Center know because they would like to keep track.

viii. Moira suggested the possibility of adding a person from each circuit to membership committee.

ix. Judge Holderman stated that he believes the circuit liaisons are a fantastic idea. He also suggested exploring the idea of adding a national liaison subcommittee to membership committee. The name of the subcommittee Art is chairing should be changed from "National Membership" to "National Outreach."

x. Mike Bolton pointed out that lawyers are also interested in the process this committee followed in getting to where we are now. That might be passed along via communications from judge to judge. Judge Holderman pointed out that that is the message he has been giving, that this whole process is a product of the bar. He believes the results are a tribute to everyone on the committee.

xi. Jeff Sharer pointed out this outreach should also be used to try to find out about similar programs being considered elsewhere.

xii. Judge Holderman pointed out that the Federal Judicial Center is in the process of choosing new director. That process will be complete in June 2011. Judge Holderman will attempt to convince the new director to try to help us communicate with other courts around the country. Judge Holderman will continue to try to get feedback from judicial side.

xiii. Judge Nolan stated that in terms of other efforts, the only things she is aware of is a number of standing orders around country. Those standing orders are collected in one place on the KL Gates site. But most of them are formal documents written by judges, not the product of committee collaboration like the Principles.

xiv. Art was asked to circulate the order from his case in California. He agreed to do so as soon as the order is entered or, in the alternative, to circulate the case name and number so members could download the order from Pacer.

xv. George Bellas pointed out that the State of New York is considering adopting principles similar to ours.

xvi. Karen Quirk stated that she has heard that Illinois may have a new initiative as well. Judge Holderman noted that he was approached by the Chief Justice of the Illinois Supreme Court. Any initiative by that court may or may not be done through a committee.

xvii. Karen Coppa discussed an interesting state court case. One party requested thousands of emails, and opposing counsel objected, citing the principles. The requesting party eventually backed down and withdrew or limited its request.

H. Technology Subcommittee – Co-Chairs Jennifer Freeman and Sean Byrne. Jennifer Freeman provided an update

i. The subcommittee is on track to provide a draft deliverable prior to the next committee meeting.

ii. Jennifer Freeman and Sean Byrne plan to sort through some recent requests for membership, and have those people assist after they have a draft completed.

iii. Kroll is helping with the content, helping compile the deliverable.

I. Website – Developers Chris King and Tim Chorvat. Chris King provided an update on the subcommittee's work.

i. The website is just about ready to launch. Chris has received a few final suggestions for changes. He promised to make those changes next week.

ii. Chris went through each page on the site with the members of the Committee: Home, About the Committee, Resources, News, Cases, Speakers Bureau, Surveys.

iii. Chris asked committee members to suggest public domain non-copyrighted material to add to the cite. He also thanked Christina Zacariason for the excellent work on the case law summaries, other members of the committee who assisted him, and Justia, the company hosting the site. Judge Holderman thanked everyone involved, and particularly Tim Chorvat and Chris King and George Bellas, who put us in touch with Justia.

iv. The website address is http://7th circuitbar.justiapro.com. The launch will take place during the first week of May.

v. The Committee had an extended discussion about how the information on the site will be kept up to date.

a. Judge Nolan stated that the plan is for each subcommittee to be responsible for updating information on its page. The responsible person need not be the committee chair; each committee should assign a volunteer who will provide the information to Justia. For now, they will do the updating. Judge Holderman suggested that each committee assign a different person each month.

b. Chris King stated that the hope is that eventually subcommittees will be able to post information directly, through assigned webmasters, instead of having to go through Justia. Justia has agreed to provide training for this purpose. Each subcommittee should have 2 webmasters who will identify content and make sure it gets posted to the site.

c. Chris King and Kate Kelly both pointed out that the Education Committee will bear responsibility for a disproportionate share of the updating. Kate Kelly asked that the full committee assist with updating the list of relevant cases. Christine – asking full committee to help with cases. Christine agreed to stay on for

awhile on the case issue. Natalie Spears – suggested seeing if law clerks in building might be interested in Education committee.

d. Judge Nolan pointed out that Westlaw and Lexis have a service that will give you a weekly update on any area and by circuit. A member of the committee noted that the ISBA offers fastcase to every member. Tim Chorvat is the liaison to the ISBA. Tim also noted that Google Scholar may be another way to keep this up to date.

vi. Judge Nolan discussed how to tell people about the new website. It will be announce at the upcoming 7th Cir Bar Association meeting. We will do a CM/ECF announcement in each of the District Courts in the Seventh Circuit. Judge Holderman will ask other large District Courts to see if they would be willing to do a CM/ECF blast. Judge Nolan informed the committee that the Law Bulletin would like to write article on new interim report and website.

vii. Chris King raised the possibility of getting a link on the United States Courts website.

viii. Judge Nolan – who will keep In the News updated? Education and Outreach.

ix. Chris King asked that the ECF blast be split up rather than one blast. Concerned about crashing the site if you send to everyone on the same day. Suggested 4,000 at a time. The site is scheduled to go live Wednesday, May 4. We will start sending out the ECF blasts May 5. All notices will be completed by May 16.

x. Chris King agreed to make a few changes that were discussed, including moving up the "Principles" and increasing the font.

3. New Business

A. Judge Holderman stated that he is overwhelmed by website and effort that has put into this.

B. Regarding the Phase II Interim Report:

i. It will be presented at the Seventh Circuit Bar Association Annual Meeting and Judicial Conference in Milwaukee, May 16-17, 2011

ii. Tom Lidbury did the drafting of the Report, and he did an excellent job.

iii. Several revisions were discussed:

a. Judge Holderman noted that the report could have a footnote listing the provisions that were changed.

b. Chris has emailed some new language for the Technology Committee that will be added. Sean concurred.

c. "Web site" will be changed to two words where it is not already written that way..

d. Tom Lidbury will prepare the redline of the changes to the Principles that will be included in the Report. A Website Subcommittee will be added.

iv. Judge Holderman asked that committee members get any additional proposed changes to Gabi or Peggy by Friday.

C. Report on ESI Program "Principles and Practical Application" in Madison, Wisconsin, was held on April 11, 2011. Judge Nolan summarized. Had previously done a program in Milwaukee. Tim Edwards, Jim McKune, Rich Moriarity, Judge Nolan, Judge Crocker all participated. 75 lawyers from Madison attended. Every city has its own culture. In Madison, most were familiar with the Principles. It's appealing to take these on the road. We need to have a program in Indiana soon. A husband/wife team Mike Bolton and his wife Susan Cox – did a program. Mike Bolton and his wife Susan Cox. At Debra Bernard's class.

D. Kate Kelly provided a report on April 6, 2011 Merrill Webinar

4. 2010-11 Goals

A. Continuing our Education and Outreach Programs

i. Kate Kelly has a few ideas for programs. She asked that members let her know of additional ideas for topics or speakers. Judge Sheindlin will be here 9/8 – with Mary Rowland and Ken Withers – taping a Rule 26 program for Sedona. They're hoping to have an audience. The Fed Bar Ass'n meeting in Chicago is the same day. .

B. Increasing the Participation of Judges

C. Additional Courts

5. Long Term Goals

A. Continue to Implement Effect Discovery Principles and Procedures

B. Providing Justice to All Parties While Minimizing the Cost and Burden of Discovery in Litigation in the United States.

6. **Next Meeting: September 21, 2011.**

13. September 21, 2011

Seventh Circuit Electronic Discovery Pilot Program

September 21, 2011 Committee Meeting Agenda

1. Introduction of Committee Members

2. Subcommittee Reports
   A. Education Subcommittee - Co-Chairs Mary Rowland and Kate Kelly
   B. Early Case Assessment Subcommittee - Co-Chairs Karen Quirk and Tom Lidbury
   C. Preservation Subcommittee - Co-Chairs Jim Montana and Tom Lidbury
   D. Survey Subcommittee - Co-Chairs Joanne McMahon and Natalie J. Spears
   E. Communications and Outreach - Co-Chairs Alexandra G. Buck and Steven W. Teppler
   F. Membership - Co-Chairs Moira Dunn and Mike Gifford
   G. National Membership - Liaison Art Gollwitzer
   H. Technology Subcommittee - Co-Chairs Jennifer Freeman and Sean Byrne
   I. Website - Developers Chris King and Tim Chorvat

3. New Business
   A. Formation of two new Subcommittees: Criminal Discovery Subcommittee and Voluntary Mediation Subcommittee (Chris King)
   B. Report on September 9, 2011 Civil Rules Mini-Conference - Dallas (Judge Nolan)
   C. Report on September 8, 2011 Videotaped Presentation of Mock Rule 26(f) Meet & Confer
   D. Updated Caselaw Summary (Christine Zachariasen)

4. 2011-2012 Goals
   A. Continue Our Education and Outreach Programs
   B. Increase the Participation of Judges and Add Courts
   C. Survey Phase Two Judges and Lawyers (March 2012)
   D. Complete Final Report on Phase Two (May 1, 2012)
   E. Begin Phase Three (June 2012)

5. Long Term Goals
   A. Continue to Implement Effective Discovery Principles and Procedures
   B. Provide Justice to All Parties While Minimizing the Cost and Burden of Discovery in Litigation in the United States

6. Next Meeting

Seventh Circuit Electronic Discovery Pilot Program
September 21, 2011

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1. Introduction of Committee Members.

Judge Holderman circulated the subcommittee list and asked members to confirm the list of committees on which they wish to serve.

The members participating by telephone included:
Richard Denny
Art Gollwitzer
Richard Burke
Rich Moriarty
Katie Paulson
Steve Puiszis
Carina Geraghty
Vicki Redgrave
Jim McKewan
Matt Pfeiffer

The members appearing in person introduced themselves and signed in on the attendance sheet.

2. Subcommittee Reports.

A. Education Subcommittee – Co-Chairs Mary Rowland and Kate Kelly.

Kate Kelley presented the subcommittee report.

The seminar on the 4 Ps of electronic discovery -- proportionality, preservation, privilege, and privacy – is going to be repeated. Jonathan Redgrave leads the program. It was an outstanding program last time, with a great response. Jonathan was terrific. The first run of the program sold out shortly after the invitations were sent out. In order to accommodate people who wanted to attend but couldn't, we are running the program again. Those waitlisted people, and the members of this committee, are the only people who have been invited thus far. Only about 50 or so have registered for the event thus far. We will also open up the invitations to courthouse staff. But we would like to avoid doing an invite via an email blast, as that will likely lead to a number of unhappy people who attempt to register but are unable to. Last time, we attempted to record the event. We would like to do so again. Judge Holderman is attempting to set up a new recording system in the ceremonial courtroom.

The committee will also run another webinar in November. It will be titled The Ethics of Ediscovery. Cyndy Motley has volunteered to coordinate the program. We are looking for a November date. Magistrate Judge Mark Dinsmore from the Southern District of Indiana has agreed to be part of the panel.

Our last webinar was a great success. 1300 lawyers registered, and 2000 attended. Overall, the webinars in the last year brought in approximately 5000 participants. Prior webinars are available on the committee's website. At this point, the video presentation is not yet on the website.

The goal is to produce 2 webinars per year. One member of education subcommittee will spearhead each webinar. Possible future topics include coding, project management, and technology 101. We still need a few additional topics for webinars for the early part of next year. We are also looking for additional places to post our webinars other than the website.

Sean Byrne reminded the committee that Project Leadership Associates does a lot of work with Microsoft. He has approached them to provide additional bandwith to help defray the costs of hosting webinars. Microsoft has expressed an interest, but it has not fully committed. It was pointed out that we have a new member on the committee -- Steve McGrath – who is an IP lawyer at Microsoft, and who joined in last few days. The committee will reach out to him as well on this issue.

Sean is also the chair of the Chicago Symposium of Litigation Support Managers. There are several slots open for speakers: international ediscovery and others. The commitment is about an hour, and any volunteers will get lunch, and will be free to attend the other sessions.

B. Early Case Assessment Subcommittee – Co-Chairs Karen Quirk and Tom Lidbury.

Tom Lidbury stated that there are no new developments to report.

C. Preservation Subcommittee – Co-Chairs Jim Montana and Tom Lidbury.

Tom Lidbury stated that there are no new developments to report.

D. Survey Subcommittee – Co-Chairs Joanne McMahon and Natalie J. Spears.

Tiffany Amlot, who will be part of the survey subcommittee, provided the subcommittee's report.

The next survey will be conducted in March 2012 survey. The subcommittee will be gearing up for the survey in October. It will look at the baseline survey, gather comments, and work on creating the March 2012 survey. Judge Holderman stated that the survey results will be published at the Federal Bar Association meeting, which in 2012 starts May 6. The Committee will also present the final report on Phase 2 at that meeting.

Judge Nolan stated that the federal judicial center has volunteered to work with the survey subcommittee to complete and administer this Phase II survey. The survey will be distributed to all participants in program in Indiana, Illinois, and Wisconsin. The 10 questions from the Phase I survey will be repeated. Emery Lee from the FJC will be assisting with the drafting and coordinating the administration of the survey. We are still trying to figure out a way

to automatically identify the cases in each of the three courts that are involved in the program. Each judge keeps track of the cases in a different way, which makes flagging the cases more difficult. We are working on a method for isolating the cases involved in the program for survey purposes.

For any additional members who are interested in joining, the survey subcommittee will be drafting survey questions, and then working with Emery Lee to make the survey happen.

E. Communications and Outreach – Co-Chairs Alexandra G. Buck and Steven W. Teppler.

Alex Buck provided the subcommittee report.

This committee has been quiet since the website was launched. Alex has received a couple of articles from members. But she is not receiving members' reports of speaking engagements. For any speaking engagements you have, please send the date, title, and what it was for to Alex.

Judge Nolan and Judge Holderman pointed out that with the new website, people interested in having a speaker will have an opportunity to research candidates and determine where they have spoken before. Members of the committee have spoken in 15 different states and 2 foreign countries.

The subcommittee is also collecting and posting articles that mention the program. But the subcommittee is also collecting, but not posting for the public, the actual presentations people have used. Those will be available only to Committee members.

F. Membership – Co-Chairs Moira Dunn and Mike Gifford.

Moira Dunn has had to step down as chair of this committee, but she will remain as a committee member. The committee is considering whether to add another co-chair to join Mike Gifford.

Mike Gifford provided the subcommittee's report.

There has been little activity since the last meeting. Seven or eight additional members have joined the committee since we last met. Mike has been processing new members, getting them on the rolls, and working on the process of assigning them to subcommittees. Judge Nolan stated that each new member should contact Mike and then one of Judge Holderman's current assistants, who will maintain the list of members. If current members have information changes, they should send that to Mike as well. Mike volunteered to combine new member and member update information and send it to Judge Holderman's assistants.

During the meeting, Judge Holderman circulated a roster for each of the subcommittees and each member added his or her name and made corrections as necessary.

G. National Membership – Liaison Art Gollwitzer.

Art Gollwitzer provided the subcommittee report.

He stated that the subcommittee has had a couple conference calls. They now have volunteers or circuit liaisons from each circuit. They have discussed ways to spread the word regarding the principles. They now have a group of people who are watching what the committee is doing and spreading the word. Art has offered to act as liaison for those liaisons. The 9th Cir liaison published an article in Semantec's blog. Art asked committee members to let him know if they know lawyers outside the Seventh Circuit who want to be part of the effort.

Art has also been keeping an eye on articles mentioning the principles. One of those articles was in the Economist, and he emailed the author to follow up.

Art asked whether a packet for Judges could be circulated. Some of the liaisons have mentioned that judges outside the 7th Circuit are interested in the program.

One of liaisons in 9th Cir has said that the ADR community is interested. It also has a need for mediators. There is a lot of interest around the country in the mediator idea. Judge Holderman suggested putting that contact in touch with Chris King.

Judge Nolan stated that the Committee has created a judge packet, and they will share it with Art Gollwitzer so he has it available for those who inquire. Judge Nolan also stated that Sedona is scheduled to come out with a great new packet on the subject of e-discovery within 2 months. The Sedona packet will be shared with the Committee members and posted to the website once it is available.

Art Gollwitzer also pointed out that he received an email as an ECF filer in the Western District of Texas. They are looking to address the issue of e-discovery through local rules and they have asked attorneys for comments on the local rules. He offered to provide them with thoughts on e-discovery consistent with the principles. This process may be repeated periodically throughout the country. Chicago attorneys may receive ECF notices from other districts. Judge Holderman offered to check in with the committee revising the local rules in the Western District of Texas and attempt to put them in touch with Art. Judge Holderman also stated that an update of our local rules relating to e-discovery may be part of Phase III of our program.

H. Technology Subcommittee – Co-Chairs Jennifer Freeman and Sean Byrne.

Sean Byrne provided the subcommittee report. He spoke to the Justia people regarding posting an EDRM model on the website. The model would set out the technologies applicable to each phase of the process. The subcommittee is planning to reach out later to subject matter experts to put some depth and breadth behind the writeups.

I. Website – Developers Chris King and Tim Chorvat.

Chris King provided the subcommittee report.

Chris asked people to look at and use the website, discoverypilot.com. It has a good collection of objective, useful information. Since the website launched, there have been 1716 visitors. This month, there were about 305. The ECF blast announcing the website did not go out, but it will go out soon. It will be sent out in waves to avoid crashing site.

The plan for keeping information up to date is to use multiple webmasters, divided among the different committees. The initial webmasters responsible for updating the different pages will be as follows:

Home page and website: Chris King and Tim Chorvat
Committee and membership – Mike Gifford
Resources and cases citing pilot program and education committee – Christina Zachariasen and Martin Tully
News and outreach – Alex Buck
Surveys – Chris King
Technology – Jennifer Freeman.

If members have content they you wish to add, send it to the people listed above.

Judge Holderman reaffirmed that the website has served as a great outreach tool. He spoke last week to the Intellectual Property Institute of Canada, which was visiting Chicago. It was terrific to be able to direct them to the website.

3. <u>New Business</u>.

A. <u>Formation of two new Subcommittees: Criminal Discovery Subcommittee and Voluntary Mediation Subcommittee (Chris King)</u>.

Judge Nolan discussed the formation of a new Criminal Discovery Subcommittee. Many of the people she has spoken to regarding the Committee and e-discovery have asked that we add a criminal subcommittee. The thinking is that these issues are running 3-4 years behind in criminal cases. There is a body of case law that exists. It relies to a certain extend on civil case law, and there is some crossover between the two.

Judge Nolan has spoken to Gabe Plotkin and Beth Gaus and asked them to join the subcommittee. She would also like to include one AUSA. Their office is very interested in these issues.

Judge Nolan asked the Committee for a vote on whether to add a new criminal discovery subcommittee. The idea was unanimously approved.

Judge Nolan recommended that Beth Gaus and someone from the U.S. Attorneys' office serve as co-chairs. Sunil Harjani's name came up as a possibility from the US attorney's office. Judge Nolan had already contacted Dave Glockner for a recommendation, and she will follow up with him and suggest Sunil Harjani.

Another possibility is to have someone who could do a training program. The upper levels of the national USDOJ has shown interest in this effort. The Committee should also be contacting other federal defender offices around the country.

Judge Nolan also proposed the addition of a new Voluntary Mediation Subcommittee. Chris King circulated to the Committee a proposed description of a new mediation program. The idea is to create panel of people knowledgeable in ediscovery to serve as voluntary mediators in civil discovery disputes, starting in the Northern District of Illinois and extending later to other districts. He worked with Judges Nolan, Schenkier, and Denlow to put together a proposed set of rules or elements of a program.

In summary, the idea is to create a group of lawyers who would volunteer to give their time to help mediate cases. Judges would propose cases where mediation would help, and the mediation could be mandatory or voluntary. There will be no formal constraints on how the mediator conducts the mediation, and all aspects of the mediation will be confidential. We will do anonymous data collection to help us measure success of the program.

Tim Chorvat commented on the timeliness of this effort. The Circuit Court of Cook County, is currently moving toward a standing order that would permit mediators for e-discovery issues in their cases. Judge Nolan has spoken to Judge Goldberg, a judge in the Circuit Court, about this issue. Apparently, the state program will charge those using it. The federal program we are contemplating will be free.

Judge Nolan stated that the Northern District of Illinois already has a panel for representation in settlement conferences, and that program has been very successful. She thinks it will be helpful to be able to turn to mediators in cases involving difficult e-discovery issues.

Dan Graham discussed local rule 20 in the Circuit Court of Cook County. It provides for mediation of major cases, but the mediators are not required to mediate for free. The question has come up whether that rule could also cover disputes that are limited to discovery. They concluded that it could, that Rule 20 is flexible enough for Judges to appoint mediators for discovery disputes. But in state court, these are paid engagements.

Judge Nolan stated that when she met with Judges Schenkier and Denlow, they decided it would make sense to start with a pilot program. The mediators will come from 4 firms – Pugh Jones, SNR Denton, Sidley & Austin, and one other. We will attempt this with a few cases to test it out. Chris King stated that the program is ready to launch. For this under the radar pilot, we will not use a formal training process, but the pilot program will help us determine what training would be helpful or necessary if a larger program was launched.

Judge Nolan stated that Loyola is having a free training program on October 7. The Committee has members who are participating as speakers – Christina Zachariasen and Art Howe.

Judge Nolan stated that we will need a law clerk who can coordinate these mediation cases. That's one administrative thing that has not been addressed. This program will not be limited to those in need. Steve Puiszis stated that issue in the state court mediation programs is that people don't have experience. People can use this program to help them gain that experience. Sean Byrne stated that since this program is designed to lighten the burden on judges, it is in everyone's interest that it be free.

The Committee approved the new program.

Chris King offered to serve as the coordinator of the program on an interim basis. But he stated that he understands that in the future the will want this not be handled by a firm.

Judge Nolan asked the DePaul representatives at the meeting whether it could help with this, and they agreed to discuss the issue offline.

Judge Holderman asked whether this program could be expanded to include state court cases? Chris King suggested that we start with the federal courts, and later consider whether to include other courts. Cyndi offered to volunteer to be a co-chair for this new subcommittee, and others offered to help with the committee.

Todd Flaming pointed out that there was currently no subcommittee for small cases, and he offered to serve on a small case subcommittee that would focus on all issues in those types of cases. Judge Holderman asked Todd to put together a proposal for the next meeting.

B. Report on September 9, 2011 Civil Rules Mini-Conference – Dallas (Judge Nolan).

Judge Nolan gave a report on the September 9 civil rules mini-conference. She stated that the hottest issue out there right now is whether the committee will propose rule amendments in November covering preservation and sanctions. Judge Nolan was invited to a mini-conference on this issue. There were about 40 people around the table, including 7 from the civil rules committee and 35 others. They met for a full day, from 730 am to 4 pm.

The participants were bombarded with documents. The defense bar was very vocal and active, and expressed a desire for a preservation and sanctions rule. This whole effort had its genesis in the Duke conference last year, when many of these issues were discussed, and the momentum has built since then.

A number of in-house counsel attended the min-conference. Judge Nolan has all of the materials she received, and she happy to share with anyone who wants to look at them. Almost everyone at the meeting commented on the fact that the work this Committee has done has been outstanding. This Committee is in the forefront of this change. Judge Nolan gave a speech at the end of the meeting. She proposed holding off on any rule change. The federal rules were changed on this issue less than 5 years ago. District courts are struggling to get used to and work with those rules. If the civil rules committee were to pass a rule now, that could cut off that activity.

Alison Stanton of the Department of Justice attended the meeting. One-third of all cases filed in fed court involve the DOJ.

The vote on a possible rule change will be in November. Judge Nolan will not have a vote on the civil rules committee. One of the things that happened at the meeting is that Judge Scheindlin and some of other judges in the SDNY are starting to put together a pilot program there for complex cases only.

It came out during their work that there are differences between federal and state cases. The biggest problems are the large complex cases. The NY State Bar Association has put together a document called the Best Practices in Ediscovery. It has 14 guidelines in this area. It is a helpful document both for the Committee and for our members' practices. This is a separate effort from Judge Scheindlin.

Judge Holderman stated that he hopes this Committee will be able to coordinate with the SDNY and its efforts.

C. Report on September 8, 2011 Videotaped Presentation of Mock rule 26(f) Meet & Confer.

Judge Nolan gave a report on the September presentation. It was co-sponsored by Sedona and Cohassit. We had done the same thing 5 years ago. It involved a videotaped mock Rule 26 conference and Rule 16 conference.

Steve Puiszas said that it is one of the best programs he's ever seen. Has asked for a copy of tape, he would like to use it in their internal training. Judges will also be encouraged to watch this. Committee members Tom Lidbury and Mary Rowland, who participated, gave their thoughts on the program. The video will be available on our website.

D. Updated Caselaw Summary (Christine Zachariasen).

Christina Zachariasen has updated the cases on the website. She searches for new case law in the 7th Circuit that hits on certain search terms, creates drafts summaries of the resulting cases, and puts those under the Resources tab on the website (General case law). She will also add the Sedona case law update under the Resources tab. That updates has all national case law. Once the Sedona update is on the site, we will take down the seminal case list and replace it with the link to Sedona. They will do the list by topic and alphabetical. Christina updates our 7th Circuit list every quarter.

Art Gollwitzer pointed out one issue: the link to cases citing the pilot program is on the news tab of the website. Chris King stated that it will be moved to the cases section.

4. 2011-12 Goals

A. Continue our Education and Outreach Programs

B. Increasing the Participation of Judges and Add Courts
C. Survey Phase Two Judges and Lawyers (March 2012)
D. Complete Final Report on Phase Two (May 1, 2012)
E. Begin Phase Three (June 2012)

5. Long Term Goals

A. Continue to Implement Effect Discovery Principles and Procedures
B. Provide Justice to All Parties While Minimizing the Cost and Burden of Discovery in Litigation in the United States.

6. **Next Meeting**. December 7, 2011.

14. December 7, 2011

Seventh Circuit Electronic Discovery Pilot Program

December 7, 2011 Committee Meeting Agenda

1. Introduction of Committee Members

2. Subcommittee Reports
   A. Education Subcommittee - Co-Chairs Mary Rowland and Kate Kelly
   B. Early Case Assessment Subcommittee - Co-Chairs Karen Quirk and Tom Lidbury
   C. Preservation Subcommittee - Co-Chairs Jim Montana and Tom Lidbury
   D. Survey Subcommittee - Co-Chairs Joanne McMahon and Natalie J. Spears
   E. Communications and Outreach - Co-Chairs Alexandra G. Buck and Steven W. Teppler
   F. Membership - Chair Mike Gifford
   G. National Membership - Liaison Art Gollwitzer
   H. Technology Subcommittee - Co-Chairs Jennifer Freeman and Sean Byrne
   I. Website - Developers Chris King and Tim Chorvat
   J. Criminal - Co-Chairs Beth Gaus, David Glockner and Megan Morrissey

3. New Business
   A. Report on Two Proposed Subcommittees - Small Cases (Todd Flaming) and Voluntary Mediation Subcommittee (Chris King)
   B. Report on November 30, 2011 ESI and Ethics (Cinthia Motley)
   C. Updated Caselaw Summary (Christine Zachariasen)
   D. Continuing to Encourage Diverse Practice Perspectives on the Committee
   E. Federal Circuit's E-Discovery Model Order

4. 2011-2012 Goals
   A. Continue Our Education and Outreach Programs
   B. Increase the Participation of Judges and Add Courts
   C. Survey Phase Two Judges and Lawyers (March 2012)
   D. Complete Final Report on Phase Two (May 1, 2012)
   E. Begin Phase Three (June 2012)

5. Long Term Goals
   A. Continue to Implement Effective Discovery Principles and Procedures
   B. Provide Justice to All Parties While Minimizing the Cost and Burden of Discovery in Litigation in the United States

6. Next Meeting

Seventh Circuit Electronic Discovery Pilot Program
December 7, 2011 Committee Meeting Agenda and Minutes

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1. Introduction of Committee Members

The committee members participating by phone included:

Karen Coppa
Karen Quirk
Howard Sklar
Carina Geraghty
Arthur Gollwitzer
Vicki Redgrave
George Bellas
Pauline Levy

2. Subcommittee Reports

A. Education Subcommittee – Co-Chairs Mary Rowland and Kate Kelly

Kate Kelly and Mary Rowland presented the report, which included updates on the following:

Webinars. Kate Kelly discussed the November 30 webinar. There were 2705 registrants for the webinar. For this webinar, we arranged for CLE approval for groups, and thus the registrants for this webinar included groups. We did have some streaming issues. As of the December meeting, the link for the webinar remained active. Wilson Elsner helped pay for the costs of the webinar – it paid for bandwith for 10,000 viewers. After that number has been reached, the webinar will be moved to website. There was some concern that the Southern Dist of Illinois did not do an ECF blast notifying attorneys in that district of the webinar.

Attorneys who view the webinar after the fact do not receive CLE credit. The comments on the webinar were largely positive. Judge Dinsmore, in particular, received positive reviews.

The next webinar will include Greg Schade, and it will address Tech 101. One of the first questions from the last webinar was "what is ESI"? Accordingly, the committee decided that a webinar on the basics of technology would be useful. It will be held in February or March. The subcommittee is looking for feedback on content.

Seminars. Mary Rowland discussed three seminars planned for the next year. The first will be a seminar put on by the criminal discovery subcommittee. It may be in March – Judge Nolan stated that the subcommittee will decide. It will be a live seminar. A second seminar will address predictive coding and advanced searching. It will take place on June 14, 2012. It will include a panel with several well know people in the industry, including Jason Baron, a head researcher at the National Archives. It may be 2-3 hours, or it may be a full day. We are

speaking to law schools and bar associations for a possible larger venue. Judge Nolan suggested possibly using the Gleacher Center or Northwestern's downtown campus auditorium. A third seminar, tentatively scheduled for the fall, will address advanced topics and issues in social media and cloud computing.

Todd Flaming suggested another possible seminar, relating to small firms and/or asymmetrical cases.

Judge Nolan reminded the committee of the Seventh Circuit Bar Association meeting May 7-8, 2012. Judge Holderman will be presenting the final report on phase 2 at that meeting, early in May 8. Judge Nolan is hoping to have available that day (a) a powerpoint and run through slides, (b) the report on flash drive (possibly sponsored), and (c) staffed booth.

B. Early Case Assessment Subcommittee – Co-Chairs Karen Quirk and Tom Lidbury

Tom Lidbury stated that there is nothing new to report on this subcommittee or on preservation. Once the survey is complete and the results come out, the subcommittee will review those results and make recommendations for possible adjustments to the program and principles.

Judge Nolan pointed out that on that preservation issue, we are waiting to see if the Rules committee adopts a new rule on preservation. That committee is meeting in March. Judge Nolan is not sure whether and what proposal they might adopt. Alex Buck added some new material in the In the News section of the website on this issue.

John Barkett discussed the Rules committee's deliberations. The discussions on this issue started at the Duke meeting. They have discussed various approaches to trigger, scope, and culpability. The proposals on these issues have ranged from doing nothing to quite drastic change. If he had to predict, he would say they probably will not pass a rule addressing trigger or scope, but he would not be surprised to see a proposed change to Rule 37 to bring some order to the culpability standards in the circuits, especially with respect to punitive sanctions. The standard varies from circuit – including negligence in some circuits to bad faith in others – and there is a sense that that variation may not be just. Judge Kravitz, chair of the Advisory Committee on Civil Rules, and Judge Rosenthal sent out a joint message suggesting that the group move forward with what they can do, what they can agree upon. Both were going in the direction of a sanction issue.

Judge Holderman noted that John Barkett sent around a link to his article about the program and analyzing the principles. He stated that it is a terrific article.

Judge Nolan reported on the Dallas mini-conference on this issue, which she attended. She suggested that the committee wait to change the rules in part because more courts may be doing programs like ours. Before adopting a national rule, it would be helpful to have a series of local rules in place. The Southern District of New York has a new order and proposals for complex cases, as of November. The Northern District of California has also started its version

of a modified program. Judge Nolan suggested it would be helpful to note these other programs in the In the News section of the website.

C. Preservation Subcommittee – Co-Chairs Jim Montana and Tom Lidbury

See discussion above.

D. Survey Subcommittee – Co-Chairs Joanne McMahon and Natalie J. Spears

Natalie Spears gave the report for this subcommittee. A meeting of the subcommittee has been scheduled for January. We originally anticipated holding the meeting in November or December. But after talking to Emery Lee at the FJC, we identified some issues associated with identifying the specific cases that are in the program. We have been working on setting up a systematic way of doing that, and that has presented some challenges.

At this point, the crux of the work of the subcommittee involves identifying what, if any additional questions to ask as part of the new attorney and judge survey, and whether we should do another baseline survey, and if so, whether the content of that survey will change. The FJC has been very helpful in this process. Natalie gave an alert to the other subcommittees: their help will be needed after the results come back in mid-March or so. Judge Holderman noted that each of those subcommittees also needs to be prepared to draft of summary of its work for the Phase 2 report.

E. Communications and Outreach – Co-Chairs Alexandra G. Buck and Steven W. Teppler

Alexandra Buck provided the report. She asked that each committee chair add a contact person to be listed on the website. We could list them in a new box on the front page or under a Who to Contact tab. She gets a number of contacts after each webinar and on other issues. She also suggested identifying a specific contact person for each CLE program. Mike Gifford stated that that information is available on the membership page.

Alex also raised the issue of third party articles of interest, and whether it makes sense to post such articles in the In the News section of the website. One member suggested may not be a good idea if you do not know the person or their work. Judge Nolan stated that it could be useful to have links to balanced articles, and thus is might be useful to post links to Judges' articles. Alex and Steve Teppler agreed to discuss this issue offline and report back.

Alex reminded committee members to provide her or Steve with information about articles and speaking information, once information is complete. Judge Holderman stated that it will be important to have this information available for the Phase II report.

F. Membership – Chair Mike Gifford

Mike Gifford gave the subcommittee report. He said that there has been some activity since the last meeting – about a dozen members have been added. He agreed that adding the

information about membership to the front page of the website is a good idea. Judge Nolan emphasized that members should make sure Mike has their information, and she reiterated that each new member should join at least one subcommittee.

G. National Membership – Liaison Art Gollwitzer

Art Gollwitzer provided the subcommittee report.

The subcommittee had a call on December 5. It now has volunteers/liaisons (in some cases, multiple people) in all but the 1st, 2d, 8th, and 11th Circuits. In the recent call, Mike Carbone discussed an article he plans to do comparing our Committee's Principles to the details of Judge Radar's model order in patent cases. He is hoping to get the article published in an ADR journal. Consensus in their group was that our order is more complete.

A couple members attended Georgetown advanced e-discovery principles seminar. The seminar made only a brief mention of the Principles. The panels are apparently made up mostly of judges. Judge Nolan stated that Judge Holderman gave the keynote last year. A couple members discussed reaching out to DRI to see if we can be included in their programs.

One of members on the subcommittee – Kelly Griffith – presented on ESI to a group of state court judges.

Art will circle back with his member in the Northern District of California to discuss the new program that district court has in process.

H. Technology Subcommittee – Co-Chairs Jennifer Freeman and Sean Byrne

Jen Freeman stated that the subcommittee has some issues to address. They will meet with Judge Nolan first to discuss those issues, and then report back to the full committee at the next meeting.

Sean Byrne discussed the technology webinar planned for June. It will include Jason Baron, Herb Roitblat, Steve Teppler, and perhaps Craig Ball. Sean is hoping to include some people from the committee as well. The date for the webinar is June 14. Judge Holderman has booked his courtroom for that day just in case.

Judge Nolan asked whether we might be able to break into 4 or 5 subgroups for part of the program. Judge Nolan offered to help with space. Courtroom 2525 holds 200 people. Alison Walton suggested that Symantec may be able to offer the Union League Club for this event. Sean agreed to discuss this possibility with Alison.

John Barkett stated that in terms of expected attendance, the Committee should keep in mind that there will be many programs on this issue this year. For example, there is an ABA program May 16-17. There will also be programs in other cities.

I. Website subcommittee – Developers Chris King and Tim Chorvat

Chris King gave the report for this subcommittee. From May 18-present, the website has had 3300 visits, with 2300 unique visitors. The most popular pages are content and resources, then cases, then webinars. The site has experienced big spikes around the times of the webinars. People have visited from a number of other countries, including Canada, India, Mexico, Australia, Russia, Germany, and Japan.

At the Georgetown conference, Judge Flynn, who was on the panel, went out of his way to talk about the Program and our website.

Chris King noted that the Tenor case, from 1st Dist. App Div of NY, mentions the 7th Cir program prominently. Tim Chorvat noted that the cases on the website continue to be updated. Tim is taking notes regarding further suggested improvements, and he asked committee members to send him any suggestions for improvements to the site.

Judge Holderman stated that the website has been terrific, and he stated that the website is making all the difference in the world.

J. Criminal – Co-Chairs Beth Gaus, David Glockner and Megan Morrissey

Dave Glockner presented the report. He stated that any members who are interested in participating should contact him or Beth. In preliminary conversations he has had with Beth Gaus, they have tried to identify areas where they can be helpful. There significant similarities and differences with the civil discovery world. They will discuss those at the seminar. They are also discussing other opportunities to offer educational opportunities for criminal practitioners who may not have electronic resources of big firms.

At the national level, the Department of Justice and the federal defender have been working on putting together draft principles. The subcommittee will review those and use them as appropriate here. They are quite far along with those principles.

Judge Nolan stated that this is the most cutting edge of the work that's taking place nationally. Ours may be the first national effort, and she is very excited about this subcommittee's work. John Barkett agreed that this is a very hot topic. Cases are starting to come down on this issue, and the common law will make the rules if rules are not put in place.

Dave Glockner stated that because criminal bar tends to work more regularly with each other, there may be an opportunity through this committee to resolve some of the practical issues that they run into. The most valuable aspect of this may be informal identification and reaching common ground on shared electronic discovery issues.

3. New Business

A. Report on Two Proposed Subcommittees – Small Cases (Todd Flaming) and Voluntary Mediation Subcommittee (Chris King)

Small cases. Todd Flaming reiterated something he raised at the last meeting. What was described at that meeting as a possible small case committee is morphing into something different, addressing a broader issue -- proportionality. Small cases are hard to define. There are also similar issues in putative class actions, which may not technically be small. But the point remains that there is little productive guidance out there. All of it seems to be at a high level. Not a lot of what you can say to your clients re what they can do.

Art Gollwitzer pointed out that there were many discussions about proportionality during the ECA and preservation committee discussions, and Principle 2.03 and 2.04 were designed to address some of these issues. They relate to efforts to create your own safe harbor, using a back and forth process that depends on the needs of the parties in that particular case.

One of the committee members participating by phone stated that the webinar scheduled for September will address the issue of resources of litigants, which is an issue separate and distinct from proportionality.

Tom Lidbury stated that proportionality was a key issue discussed throughout the formulation of the principles. But he's not sure it makes sense as an independent committee topic.

Judge Holderman stated that perhaps a nuts and bolts subcommittee makes more sense. He expressed concern that proportionality is a concept that covers all areas and would be unworkable as a subcommittee.

Judge Nolan stated that the issue she is most frustrated with is "proportionality." Everyone uses that term, but they don't explain what they mean. Judge Nolan thinks we may want to flesh out the concept of proportionality in Phase 3. For example, we may want to address the question of what a lawyer should do in a complex, high damage case v. straightforward $30,000 case. This may not require a subcommittee. Perhaps it will lend itself more to a study group for Phase 3.

Alex suggested that each subcommittee could take a look at this as part of its work in Phase 3. .

Todd Flaming stated that he agrees that there are proportionality issues at every stage of the process. But he also thinks there needs to be a group tackling this problem at a high level. Judge Nolan suggested a study group would discuss this. She instructed members to contact Todd if they wish to be part of the discussion.

Ethan Conan stated that one of the reasons this was challenging was because lawyers had very positions on this. We worked through those diverse positions in the ECA committee. So if

you are going to address this issue, there should be a diverse set of people on any subcommittee or group.

Tim Chorvat said that proportionality is infused in all of the issues we are addressing. But there is a discrete set of issues that arise in application of those principles to (a) asymmetrical cases and (b) small cases.

Judge Nolan stated that based on the discussions, there appear to be 2 possible ways to go on this: (a) make this a separate group that looks into asymmetrical cases, or (b) simply make sure that these issues are discussed as part of the existing subcommittee structure. Tom Lidbury stated that he believes the latter approach makes more sense. Judge Holderman stated that the approach may be here is the principle, but there's an additional issue: how do you apply it in certain contexts.

Adrienne Naumann stated that she sees things a little differently. She is concerned about litigants with limited resources. Their problems are sufficiently unique that they should have their own subcommittee. Adrienne believed that the original approach was good. She believes that we need a seminar and a subcommittee. It would be helpful if we could look at survey data to see what attorneys in smaller cases are saying.

John Barkett stated that this is a very important topic. Plaintiff and defendant employment bars have presented to the federal rules committee an idea for a pilot project that would require pattern disclosures in every case. The idea is that in a single employ case, the rules would establish up front what each side would disclose, helping to bring costs down. The model protocol is on FJC website. In addition, survey results may help guide us down one or another path. Also – if Judges are engaged early, some of these cases may merit require early mediation or other techniques to keep costs down.

Judge Holderman asked Todd, Adrienne, and others to focus on this aspect. Proportionality is too broad and has already been addressed. Todd and Adrienne and others will discuss the name and scope of any additional group or subcommittee.

Mediation. Chris King discussed plans for a voluntary mediation program. The program would create a panel of individuals with expertise who will volunteer to mediate for free e-discovery disputes in cases in the NDIL. There are at least two barriers to getting this started. First, we need a mechanism for administering the program. Chris thinks they have come up with a solution for that issue. Second, we need to set up training. Dan Rizzolo has been helpful in coming up with options for training. Chris expects the Committee will likely do its own training. Judge Nolan has offered to help. Initially, 8 people will be trained. Judge Nolan has done 1500 mediations, and she is happy talk to the 8 people and provide her thoughts. Judge Denlow and Shenkier may help as well.

Chris King said another issue is we need people on the panel from outside the defense bar. The current group is very defense bar oriented. The mediators have to be members of the NDIL bar and qualified from an e-discovery perspective. It would also be helpful if we can get

government lawyers and corporate counsel to participate, if they can and are willing to do it. Judges Holderman and Nolan stated that they have some names to recommend.

Judge Holderman – this will be voluntary for the parties involved. A judge may recommend mediation, but parties will not be required to take that path. The service will be called e-mediation.

B. Report on November 30, 2011 ESI and Ethics (Cinthia Motley)

See Education Subcommittee report above. Judge Holderman added that Cinthia Motley and the folks at Wilson did a tremendous job.

C. Updated case law summary (Christina Zachariasen)

Judge Holderman stated that Christina is dong a terrific job maintaining and updating the case law summaries on the website. The Sedona Conference has agreed to give us their updated national case law, and that will be on the website also.

D. Continuing to Encourage Diverse Practice Perspectives on the Committee

Judge Holderman reiterated that the Committee is looking for and welcomes everyone's input.

E. Federal Circuit's E-Discovery Model Order

See update for National Membership Committee.

4. 2010-11 Goals

A. Continue our Education and Outreach Programs
B. Increasing the Participation of Judges and Add Courts
C. Survey Phase Two Judges and Lawyers (March 2012)
D. Complete Final Report on Phase Two (May 1, 2012)
E. Begin Phase Three (June 2012)

5. Long Term Goals

A. Continue to Implement Effect Discovery Principles and Procedures
B. Provide Justice to All Parties While Minimizing the Cost and Burden of Discovery in Litigation in the United States.

Judge Holderman thanked the committee members.

6. Next Meeting

Natalie Spears reiterated that we will need the full committee's assistance during the drafting of the Phase II report.

Judge Holderman initially set the next meeting for February 29 at 4:00. By then, the committee will be in a good position for the final sprint prior to the final report. **The time and place for the next meeting was later changed. The next meeting will take place on March 1, 2012, starting at 4:00 pm in Room 1023A of the Dirksen federal courthouse, 219 S. Dearborn.**

Jeff Sher raised a point about the "Other Resources" space on the website. He asked the committee members to think about and make recommendations regarding other possible links from the website. One possible link could be articles drafted by Judges, as discussed earlier in the meeting.

15. March 1, 2012

Seventh Circuit Electronic Discovery Pilot Program

March 1, 2012 Committee Meeting - 4:00 p.m.
Room 1023A on the 10th Floor of the Dirksen U.S. Courthouse

A G E N D A

1. Introduction of Committee Members

2. Subcommittee Reports
   A. Education Subcommittee - Co-Chairs Mary Rowland and Kate Kelly
   B. Early Case Assessment and Preservation Subcommittee - Co-Chairs Karen Quirk and Tom Lidbury and Jim Montana
   C. Survey Subcommittee - Co-Chairs Joanne McMahon and Natalie J. Spears
   D. Communications and Outreach - Co-Chairs Alexandra G. Buck and Steven W. Teppler
   E. Membership - Chair Mike Gifford
   F. National Membership - Liaison Art Gollwitzer
   G. Technology Subcommittee - Sean Byrne
   H. Website - Developers Chris King and Tim Chorvat
   I. Criminal - Co-Chairs Beth Gaus, David Glockner and Megan Morrissey

3. New Business
   A. Update on Website Caselaw Summary (Christine Zachariasen)
   B. Update on Voluntary Mediation Program - (Chris King)
   C. Update on proposed subcommittee of small cases (Todd Flaming)
   D. Timetable for Preparation of Final Report on Phase Two – to be presented at Seventh Circuit Conference from 9:00 a.m. to 9:30 a.m. on Tuesday, May 8, 2012, at Intercontinental Hotel:

      2-27-12 Phase Two survey for Judges and Lawyers closed
      3-01-12 Launch of Baseline Survey
      3-09-12 Baseline Survey closed
      3-28-12 Meeting of co-chairs with Judges Holderman and Nolan to prepare for draft of final report
      4-13-12 Draft reports due to Judge Holderman
      4-25-12 Meeting of full committee to approve the Phase Two Report
      5-01-12 Issue Final Report on Phase Two

4. 2011-2012 Goals
   A. Finish Analysis of Phase Two Surveys of Judges and Lawyers (March 2012)
   B. Complete Final Report on Phase Two (May 1, 2012)
   C. Begin Phase Three (July 2012)
   D. Continue Our Education and Outreach Programs
   E. Increase the Participation of Judges and Add Courts

5. Long Term Goals
   A. Continue to Implement Effective Discovery Principles and Procedures
   B. Provide Justice to All Parties While Minimizing the Cost and Burden of Discovery in Litigation in the United States

6. Next Meeting – Wednesday, April 25, 2012, at 4:00 p.m., Room 2544A

Seventh Circuit Electronic Discovery Pilot Program
March 1, 2012 Committee Meeting – 4:00 p.m.
Room 1023A on the 10th Floor of the Dirksen U.S. Courthouse

1. Introduction of Committee Members

The following Committee members participated by telephone:

Karen Coppa
Kendra Cobb
Art Gollwitzer
Corina Gerety
Mike Gifford
Kelly Griffith
Vanessa Jacobsen
Joanne McMahon
Jim McKeown
Dan Rizzolo
Debra Richards
Dick Simon
Howard Sklar
Tina Solis

2. Subcommittee Reports

A. Education Subcommittee – Co-Chairs Mary Rowland and Kate Kelly

Kate Kelly provided the subcommittee report. We recently completed an ethics seminar sponsored by Wilson Elsner. The Jonathan Redgrave seminar will take place soon. We are currently working to make sure that all of the webinars and webcasts are on the website. All of the webinars and other presentations will be on the website soon.

The subcommittee just completed a dry run of the webinar entitled ESI 101. It is scheduled to air on March 14. There are only 1000 slots for this program. We are sending out invitations via e-blast on March 14. Viewers will receive CLE credit.

There will be a seminar on June 14 that will include Jason - Jason Baron June 14. It will be held in the Parsons ceremonial courtroom. Later this year, we plan to hold (a) a seminar on cloud computing in Milwaukee, (b) a webinar addressing issues unique to small cases, and (c) a webinar featuring Alison Walton and Art Gollwitzer on circuit updates.

Judge Holderman stated that is amazing what this committee has been able to do with no resources.

Judge Holderman also emphasized the importance of coordination and uniformity between circuits on approaches to electronic discovery. He has been discussing that recently, and at least one federal circuit court judge has raised the issue with respect to patent cases.

B. Early Case Assessment Subcommittee and Preservation – Co-Chairs Karen Quirk and Tom Lidbury and Jim Montana

These subcommittees stated that they have nothing new to report.

C. Survey Subcommittee – Co-Chairs Joanne McMahon and Natalie J. Spears

Natalie Spears provided the subcommittee report.

Joanne McMahon has been the co-chair, but she recently had to step down. Natalie pointed out that she has been tremendous, they have worked seamlessly together, and it has been a joy to work with her. The Judges thanked Joanne for her service. She will be staying on the larger committee. Joanne thanked the Judges and Natalie, and emphasized what a pleasure it has been to work with them.

The subcommittee has been very active since the last meeting. The subcommittee met to consider changes to the survey. Ultimately, the Committee hopes to be able to compare survey results from Phase 1 to Phase 2, so although there were some changes to the survey, they were not major. Working with the FJC, we launched the attorney and judge surveys on February 13. The attorney survey has closed, and our response rate has been similar to the response rates they received to surveys in the Southern District of New York. The judge survey will remain open a little longer. We should have all data and the analysis from the FJC by March 19.

Our current plan is to have a meeting of co-chairs to discuss the survey results and discuss and plan for completion of the final Phase 2 reports. The current schedule has 4 pm March 28 at 1023A as the date for meeting of co-chairs. Natalie Spears raised the possibility of moving the meeting up, but Judge Holderman's schedule was not open. The meeting will stay on 3/28. Judge Holderman circulated schedule for completing the Phase II Final Report. He will also circulate the schedule via email. The format for the report will be the same as for Phase 1. Judge Nolan stated that the final report will be presented by Judge Holderman to the various judges attending the Seventh Circuit Conference. The meeting, which will be at the Intercontinental, is scheduled for May 8 at 9 am. Judge Holderman will have a half hour. He will make a powerpoint presentation. We will also have some hard copies and flash drives with the report available at a table. We will do everything we can to market the Committee's work.

The schedule calls for an April 25 full committee meeting to approve the report. Committee members were encouraged to attend in person.

Judges Nolan and Holderman stated that they have contacted the judges who have not responded to the survey. A couple judges will not respond at all because they did not end up using the principles. The others should respond to the survey by tomorrow.

Judge Holderman thanked the survey subcommittee and stated that they are doing a great job.

Mike Gifford pointed out that he received a survey this morning. Natalie Spears stated that that is the baseline survey, which we did in 2010 and repeated this year. The survey has gone out and will close in a couple weeks.

D. Communications and Outreach – Co-Chairs Alexandra G. Buck and Steven W. Teppler

Alex Buck provided the subcommittee report. Things have been fairly quiet for this committee. Alex is concerned that members may not be sending her reports of their talks and appearances. There was a discussion of the subcommittee searching for articles by others about the program. These mentions will be part of the website, which will be up for viewing at the Seventh Circuit Conference, will have website up and will refer to these. Alex stated that she does have John Barkett's article. There was a discussion of the In the News part of the website, which is potentially very useful. Judge Nolan asked whether any members are already monitoring this for their law firm. Judge Holderman stated that he would draft library personnel to do this.

Judge Holderman stated that he may run a live presentation of the website while he's doing his presentation at the Seventh Circuit Conference.

E. Membership – Chair Mike Gifford

Mike Gifford provided the subcommittee report. He noted that the Committee has a half dozen or so new members since our last meeting.

F. National Membership – Liaison Art Gollwitzer

Art Gollwitzer provided the subcommittee report. He has been collecting articles from people in his group. He recently added an article from the Legal Intelligencer. He also holds a group call every couple months. The subcommittee is still looking for assistance from attorneys in the 1st, 8th, and 11th Circuits, and from the District Court in San Francisco, where Judge LaPorte has been active. (In Denver, Judge Schaeffer has also started a task force.) The subcommittee recently added Maura Grossman, who's active in program in the Southern District of New York. Kelly Griffith, a subcommittee member from the Fourth Circuit, has been active in going to conferences, including a Sedona meeting later in March. Judge Nolan is going to that, would love to meet up with them. Sean Byrne and Christina Zachariasen is also planning to go.

Judge Nolan stated that she loves the website, but she is also wondering if next year we should add a page about national programs. This subcommittee will be the one tasked with working on consistency and uniformity across circuits, the melding issue discussed earlier.

Art Gollwitzer stated that he continues to try to get our Principles incorporated into his orders. In addition, Alison Walton is teaching a class at Pepperdine this fall on ESI, as is Debra Bernard at Kent. There is an informal network of teachers on these issues. They will add Alison Walton to that list.

G. Technology Subcommittee – Sean Byrne

Sean Byrne provided the report. The subcommittee had one of its chairs leave – Jen Freeman. She is still on the larger committee, but she had to step down from chairing the subcommittee. Tom Thompson has agreed to take her place.

Sean stated that the subcommittee has had some challenges completing a deliverable. There will be some supplemental materials for the June event. Sean asked committee members to let him or Tom know if they are aware of technology people who wish to participate.

Judge Holderman stated that he would like to develop a list of people who have acted as e-discovery liaisons so they can share ideas and give us feedback about that role, and benefit from their experiences.

H. Website – Developers Chris King and Tim Chorvat

Tim Chorvat provided the report. Chris King has taken the lead working through most of the issues that have come up. The latest hit report shows 1141 visits, including 848 unique visitors. The visitors come from the United States, India, UK, Canada, Brazil, the Philippines, Indonesia, China, and Germany. Within the United States, the visitors are from over 100 cities, including Chicago, New York, Washington, Milwaukee, and Indianapolis.
By the time of the Seventh Circuit Bar Association presentation, the subcommittee will update the website.

Kate Kelly suggested that we should work to get links to our site on other sites. She asked Committee members to go to organizations they're involved with and ask them to add a link to our site.

Natalie Spears asked whether there was any way to make the website presentation at the Bar Association meeting dynamic, so it scrolls through a variety of different pages on the site.

Committee members were asked to email any website suggestions to Chris King.

Chris King noted that Justia has been terrific. Judge Holderman pointed out that we have not had to pay for their services.

I. Criminal Discovery – Co-Chairs Beth Gaus, David Glockner and Megan Morrissey

Dave Glockner presented the report. The subcommittee remains a work in progress. Beth Gaus is working on getting small firm and panel attorneys involved. The subcommittee will have its first full meeting soon. It is also planning a panel presentation, probably in June, with presenters from the national offices of the Department of Justice and the federal defender.

The Recommendations for ESI Discovery Production in Federal Criminal Cases have been released and are fully public now. This is the product of a joint working group, involving the federal defender and others. It is not technically a DOJ product, although they are behind it.

Judge Nolan suggested having a separate criminal discovery page on the website? It would be helpful to the judges, many of whom have struggled with ESI in criminal cases. Chris King agreed to put up a new page. He also asked the criminal discovery committee to draft content for the page, and then he would get it posted. The content will include the Recommendations.

Judge Holderman stated that this is part of the melding process discussed earlier in the meeting.

3. New Business

A. Update on Website Caselaw Summary (Christina Zachariasen)

Christina Zachariasen stated that the summaries are now up to date through 12/31/2011. By time of Seventh Circuit presentation, she will add the first quarter of 2012.

Judge Nolan stated that the judges in the Seventh Circuit have issued 90 opinions, which is likely more than any other circuit.

Judge Nolan stated that Sedona has also permitted us to link to the quarterly updates of its national survey of cases.

B. Update on Voluntary Mediation Program – (Chris King)

Chris King stated that since last meeting, he and Judge Nolan have had a series of conference calls and meetings. We have addressed two prior roadblocks: (1) Ben Weinberg at SNR Denton will be the coordinator of the program and (2) Megan Ferraro has completed a first draft of an intake program.

One roadblock still remains – we still do not have a training program, a plan for training the mediators. The subcommittee may end up preparing its own training materials and have the magistrate judges act as trainers. The professional mediators we have spoken to don't seem to work, either because (a) they want the training to last two days or two weeks; (b) there is a mismatch out there between what exists and what we need; and (c) some of them want to be paid, and out program will be free.

Chris King stated that this effort may get pushed back until after Judge Holderman's presentation.

Chris also stated that we have had three people in the industry telling us it is a bad idea to offer free mediation. The theory is that parties will not take the process seriously unless they are paying. Chris has made arguments as to why having a free program is a good thing, but these people have rejected those arguments. Chris asked committee members to weigh in by email on this issue.

Judge Nolan stated that one of the sources taking this view was based on a voluntary mediation program in Pennsylvania, which is a different type of program than the one we're contemplating. We are essentially talking about a mediated Rule 26 conference. We are trying to put power back into the hands of the lawyers and show them they can work these things out themselves.

Judge Nolan also stated that the parties in many small cases cannot afford to pay for this. She also stated that there is a possibility that we may be able to secure some money for this effort through the Federal Bar Association. In the fall, Judge Nolan may be able to help with this effort. Judge Holderman informed the Committee, or those who have not yet heard, that Judge Nolan is retiring effective October 1.

Judge Holderman stated that he knows where the concern about a free program are coming from. He went to a presentation where a judge stated that he refers these out to someone he knows who mediates them. There are problems with that.

Judge Holderman stated that people had same reaction to the overall Pilot Program – people who doubted that we could get anything done for free. But we are doing it, we are succeeding. He believes the same thing will happen with the mediation program – we can do this for free and do it well.

Chris King stated that the mediators, forms, and administrator are all ready. We just need to set up the training. Judge Holderman suggested using the magistrate judges.

Sean Byrne stated that this is threatening to people with little expertise who offer this service and charge for it. Judge Holderman stated that maybe we ought to be doing that, that is a good thing.

C. Update of proposed subcommittee of small cases (Todd Flaming)

Todd Flaming gave the report. At the last meeting, there was a lack of consensus on the need for such a committee. The plan at this point is to hold a small case webinar this fall. Judge Holderman believes that is a good starting point – it will allow us to see what community thinks of this idea, and it will give us an opportunity for some branding.

D. Timetable for Preparation of Final Report on Phase Two – to be presented at Seventh Circuit Conference from 9:00 a.m. on Tuesday, May 8, 2012, at Intercontinental Hotel:

2-27-12	Phase Two survey for Judges and Lawyers closed.
3-01-12	Launch of Baseline Survey.
3-28-12	Meeting of co-chairs with Judges Holderman and Nolan to prepare for draft of final report.
4-13-12	Draft reports due to Judge Holderman.
4-25-12	Meeting of full committee to approve the Phase Two Report.
5-01-12	Issue Final Report on Phase Two.

4. 2010-11 Goals

A. Finish Analysis of Phase Two Surveys of Judges and Lawyers (March 2012)

Judge Holderman stated that this is close to being completed

B. Complete Final Report on Phase Two (May 1, 2012)

The final report is scheduled to be completed and put to a vote for approval by the Committee by April 25.

C. Begin Phase Three (July 2012)

D. Continuing our Education and Outreach Programs

E. Increase the Participation of Judges and Add Courts

J. Judge Holderman was discussing the Pilot Program with the Chief Judge in the US District Court in Detroit this morning

5. Long Term Goals

A. Continue to Implement Effect Discovery Principles and Procedures

B. Provide Justice to All Parties While Minimizing the Cost and Burden of Discovery in Litigation in the United States.

Judge Holderman stated that he continues to believe we are changing pretrial litigation in the United States. He stated that on May 20, 2009 [check], and we are doing it. And we are doing it because of all of the people on the Committee.

Judge Nolan stated that some have said: why didn't you just adopt Sedona? Because the process we went through is tremendous. In her 14 years, she has never run into another group of lawyers like this one.

CBA e-discovery committee. Judge Holderman joined the initial meeting. The next meeting is scheduled for tomorrow at 1215.

6. Next Meeting – Wednesday, April 25, 2012, at 4:00 p.m., Room 2544A

Prior to that meeting, Committee members will receive a copy of the final report being submitted for the committee's approval. We have a lot of work to do between now and then.

16. April 25, 2012

Seventh Circuit Electronic Discovery Pilot Program

April 25, 2012 Committee Meeting - 4:00 p.m.
Room 2544A on the 25th Floor of the Dirksen U.S. Courthouse

A G E N D A

1. Introduction of Committee Members

2. Subcommittee Reports
   A. Education Subcommittee – Co-Chairs Mary Rowland and Kate Kelly
   B. Early Case Assessment and Preservation Subcommittee – Co-Chairs Karen Quirk and Tom Lidbury and Jim Montana
   C. Survey Subcommittee – Co-Chairs Natalie J. Spears and Tom Staunton
   D. Communications and Outreach – Co-Chairs Alexandra G. Buck and Steven W. Teppler
   E. Membership – Co-Chairs Mike Gifford and Marie Lim
   F. National Membership – Liaison Art Gollwitzer
   G. Technology Subcommittee – Sean Byrne
   H. Website – Developers Chris King and Tim Chorvat
   I. Criminal – Co-Chairs Beth Gaus, David Glockner and Megan Morrissey
   J. Mediation – Co-Chairs Chris King and Dan Rizzolo

3. New Business
   A. Final Report on Phase Two to be presented at the 61st Annual Meeting of the Seventh Circuit Bar Association and Seventh Circuit Judicial Conference on Tuesday, May 8, 2012, from 9:20 a.m. to 9:35 a.m. at The Hotel InterContinental Chicago (505 North Michigan Avenue, Chicago, IL)
   B. Approval of Final Report on Phase Two
   C. Change in Subcommittee Chairs or Membership
   D. Upcoming Education Programs
      - Criminal E-discovery (live)
      - Search Methodology

4. 2011-2012 Goals
   A. Complete Final Report on Phase Two (May 1, 2012)
   B. Begin Phase Three (July 2012)
   C. Continue Our Education and Outreach Programs
   D. Increase the Participation of Judges and Add Courts

5. Long Term Goals
   A. Continue to Implement Effective Discovery Principles and Procedures
   B. Provide Justice to All Parties While Minimizing the Cost and Burden of Discovery in Litigation in the United States

6. Next Meeting

Seventh Circuit Electronic Discovery Pilot Program
April 25, 2012 Committee Meeting – 4:00 p.m.
Room 2544A on the 25th Floor of the Dirksen U.S. Courthouse

1. Introduction of Committee Members

A number of people, including the following committee members, participated by telephone:

Kendric Cobb
Gary Ballesteros
Teri Santos
Claire Covington
Kelly Clay
Ethan Cohen
Pauline Levy
Elizabeth Erickson
Adrian Fontecilla
Art Gollwitzer
Joanne McMahon
Jim McKeown
Karen Quirk
Brandon Hollinder
Chris King
Kelly Twigger
Jeff Sharer
Joy Woller

2. Subcommittee Reports

A. Education Subcommittee – Co-Chairs Mary Rowland and Kate Kelly

Mary Rowland gave the subcommittee report.

The most recent webinar, in March, drew over 1000 people.

Two things are set for June: a seminar on criminal case discovery issues, and an event organized by Sean Byrne and Tom Thompson. Jason Baron will attend. The date for that seminar is June 14. It will go all afternoon.

The subcommittee will hold another seminar in the fall. Kelly Twigger is organizing the event, which will be held in Milwaukee and will cover social media and cloud computing.

One other program may be in works involving ESI and small firms and smaller cases. We are still looking for a sponsor, which could be a law firm or a consulting firm. Another possible sponsor is the ISBA, using their facility. Judge Holderman agreed to reach out to them to discuss. Our committee is helping the ISBA with a program being held at the Standard Club.

B. Early Case Assessment Subcommittee – Co-Chairs Karen Quirk and Tom Lidbury and Jim Montana

Karen Quirk gave the report. There is not too much to report. The activity since the last meeting has involved working on drafting for the final Phase 2 report.

Judge Holderman stated that he appreciated the drafting work.

C. Survey Subcommittee – Co-Chairs Natalie J. Spears and Tom Staunton

Natalie Spears gave the report. She thanked everyone for helping with the report, and Judge Nolan seconded that. It was a very difficult task, and the subcommittee chairs came up with a coherent package for the judges.

Judge Holderman thanked Joanne McMahon. He also pointed out that he now chairs the research committee of the FJC.

Judge Nolan stated that she spoke to Judge Grimm, who will be the new chair of the discovery subcommittee. They discussed the baseline survey. He may speak to Emery Lee at the FJC to get feedback for his committee, particularly on the survey results relating to cooperation. They could do the survey nationally, we would be very excited about that.

Natalie Spears pointed out that for the next phase, we should consider how we can code things to make the cases easier to pull at the end.

Jeff Sharer stated that he is on a panel at Sedona on Friday. He is looking to include something regarding our efforts in Phase 2. He raised the question of what he could/should address. Judge Holderman stated that he could share the FJC survey results, but not the report. The report will not be done until Friday. Jeff Sharer stated that he just wants to discuss conclusions generally.

Judge Nolan stated that the things that may generate the most interest may be the new subcommittees, the growth in this committee in 7th Cir. and nationally, the website, our new educational programs, and our indebtedness to Sedona.

D. Communications and Outreach – Co-Chairs Alexandra G. Buck and Steven W. Teppler

Steve Teppler gave the report.

He has also been spending most of his time working on revisions to report.

He is the planning chair for an upcoming ABA conference at Stetson. A national institute of ABA. Judges Scheindlin and Faccio will be involved.

Judge Holderman pointed out that Bob Byman, one of original members, is carrying the message of our committee to the 6th Circuit tomorrow. Judge Nolan reminded committee members that every time you speak at an event, provide the information to Alex and Steve.

E. Membership – Co-Chairs Mike Gifford and Marie Lim

Mike Gifford stated that membership has been a little slow in the last month or two while the Committee finalizes Phase 2. There are about 5 people in the queue waiting to be members.

Mike stated that he is speaking at a conference next month, on June 6, in Collinsville.

Debra Bernard is speaking in Seattle at a federal bar association meeting.

Judge Holderman stated that we do review new applicants. The rule is that they can be on the committee if they qualify.

F. National Membership – Liaison Art Gollwitzer

Art Gollwitzer provided the report.

Most of his energy in the last couple months has been spent on the Phase 2 report.

Art stated that he has forwarded all of the names of the national people for addition to full membership list.

Reminded committee members that if you're speaking outside the Seventh Circuit and people show interest, you can refer them to Art.

Judge Nolan stated that she went to a Sedona meeting in St. Louis, and she had breakfast with five people on Art's committee. Judge Holderman stated that it is good to see people spreading the word.

G. Technology Subcommittee – Sean Byrne and Tom Thompson

Tom Thompson provided the report.

The upcoming seminar will involve a mock problem on predictive coding. The speakers will include Jason Baron, Sean Byrne, Jeff Sharer, and David Lewis, and a panel discussion that they're finalizing, but that will include Ralph Losi. The program will last from 1:30-5:30 and it will be held in the ceremonial courtroom, which can handle about 250 people. The subcommittee has not decided how it will handle registration. The program will not be broadcast live, but it will be taped and put on the website. Symantec will be sponsoring a reception in the evening. Mary Rowland stated that if the program is going for four hours, we will need to arrange for some drink and a snack. Tom Thompson agreed to arrange for that.

H. Website – Developers Chris King and Tim Chorvat

Tim Chorvat provided the report.

Much of their time was spent preparing insert to the Phase 2 report. The subcommittee is also continuing to put new material on website.

George Bellas stated that Justia is continuing to support the project.

Tim stated that the number of hits on the site is okay, but they would like to see the hits increased. He encouraged people to get the word and address out there. The possibility was

raised that committee members could link to the website on their bios? Mark Rossi also raised the possibility of using other methods to increase traffic.

Kate Kelly thanked Martin Tully for getting all of the webinars and materials onto the website.

Mike Rothman asked whether there has there been any outreach to smaller bar associations in IL and WI asking them to link to the website?

Judge Nolan stated that she will ask the CBA to link/refer to us in their materials.

I. Criminal – Co-Chairs Beth Gaus, David Glockner and Megan Morrissey

Meghan Stack provided the report.

The subcommittee has been working on the June 8 program. The resulting video will go on the website. In promoting the event, they will target certain categories of people – AUSA's, federal defenders, and members of the CJA Panel. Judge Nolan asked that members of the committee also be invited. Judge Holderman said asked the subcommittee to invite the judges.

Other work: there is a defense group working on putting together a list of defense issues. Judge Nolan stated that the recent criminal discovery principles/recommendations are up on the website.

Chris King stated the one issue that is still pending is the need for a criminal discovery page on the website. The recommendations are up, but there is no separate page. Judge Nolan suggested using the information at page 39 of report for the substance to add to the web page.

J. Mediation – Co-Chairs Chris King and Dan Rizzolo

Chris King provided the report. As he discussed at the last meeting, the subcommittee has put these activities on hold pending the completion of Phase 2. At this point, we are essentially in the same place we were at the last meeting – looking for a solution to the training issue. The answer may be to create our own training program and asking out magistrate judges to help with the training.

Judge Nolan attended an e-mediation training at Loyola. It was a 2 hour program involving 7 current or former state court judges and Judge Nolan. It was very informative. Judge Nolan will work on this subcommittee in the fall. We have the 8 mediators. Judge Nolan also had an interesting conversation with someone from the Western District of Pennsylvania's paid mediation program that is run through the court, and that person may be another possible trainer. It is also possible Judge Nolan and Chris King and some other judges will do the training.

3. New Business

A. Final Report on Phase Two to be presented at the 61st Annual Meeting of the Seventh Circuit Bar association and Seventh Circuit Judicial Conference on Tuesday, May 8, 2012, from 9:20 a.m. to 9:35 a.m. at the Hotel InterContinental Chicago (505 North Michigan Avenue, Chicago, IL)

Judge Holderman next raised the issue of the Phase 2 report that was circulated to members prior to the meeting. Gaby Kennedy made some adjustments to that draft. Judge

Holderman asked if anyone had any other issues other than minor tweaking, or if anyone had any issues they wished to discuss. No one raised any issues. Mary Rowland has some typographical changes; she will get them to Gaby Kennedy shortly.

B. Approval of Final Report on Phase Two

The Committee voted on a motion to approve the final report subject to non-substantive modifications. Judge Holderman first asked if anyone wished to have any further discussion, and no one did. The vote was taken and the motion was unanimously approved.

At the Seventh Circuit conference, the report will be distributed in hard copy form (100 copies) and via flash drive (300 copies). Hinshaw has agreed to provide us with the copies. We will ask them if they can label the flash drives www.DiscoveryPilot.com. They will be delivered to the hotel. In addition, Beth Gaus, a Committee member who is also co-chair of the Seventh Circuit Committee, has made arrangements for the Pilot Program to have a table at the conference. Mary Rowland and Kate Kelly sat at the table last time.

The final report will be available on the website that day.

C. Change in Subcommittee Chairs or Membership

D. Upcoming Education Programs
- Criminal E-discovery (live)
- Search Methodology

Judge Holderman stated that no other pilot program in the United States is providing the education we are. The Committee has provided educational opportunities to over 10,000 people.

Judge Holderman stated that the website has helped. He thinks we do a better job than ALI-ABA and PLI. The Committee has really done a great public service over last 3 years. This is the premier electronic discovery program. When you ask those who are litigating on a daily basis whether the culture has changed, the answer is yes. Steve Teppler agreed.

Judge Holderman also stated that it is important that this change in culture, and the Pilot Program, has not undercut zealous advocacy, and has generally improved it. We need to get that message out; the more we do that, the more we will have this beneficial effect on litigation in US.

In Phase III, we need to focus on real cost cutting, and how we can measure that. Daniel Rizzolo asked what happened with the CLE credit for the Redgrave program, he received notice that CLE credit was denied in IL. Mary Rowland stated that that was a reporting error on our part, but the committee re-ran the taped program on April 18 and people who viewed it on that date received credit.

4. 2011-2012 Goals

A. Complete Final Report on Phase Two (May 1, 2012)

B. Begin Phase Three (July 2012)

C. Continue our Education and Outreach Programs

D. Increase the Participation of Judges and Add Courts

Judge Nolan made the point that the next meeting will be very important. Some of the subcommittee chairs from phases 1-2 are exhausted, and this might be a good time to rotate chairmanships. Some people also have ideas for new subcommittees. It makes sense to have a retreat-type meeting where we discuss what we're going to do in Phase III and what to do with chairmanships. We also need to discuss who will replace Judge Nolan.

5. Long-Term Goals

A. Continue to Implement Effect Discovery Principles and Procedures

B. Provide Justice to All Parties While Minimizing the Cost and Burden of Discovery in Litigation in the United States.

6. Next Meeting

The next meeting will be July 25. Committee members were asked to come prepared to discus priorities during Phase 3. We would like to use the meeting as a transition so we can hit the ground running in September. We will start at 3 pm to leave more time for discussion.

Judge Holderman acknowledged Christina Zachariasen and her work. That's one of the reasons people are coming to our website. The Committee really appreciates her work. Ms. Zachariasen stated that she will have the 1st quarter 2012 summaries added to the website by the May meeting. There are currently 89 opinions from courts in the Seventh Circuit included in the summaries.

In closing, Judge Holderman reaffirmed that the committee members' participation is essential and valued, and is what makes this committee great. We are doing what we set out to do, to change the culture of pretrial discovery in the United States.

C. DiscoveryPilot.com Web site (April 30, 2012)

Discovery Pilot
Seventh Circuit Electronic Discovery Pilot Program

Statement of Purpose and Preparation of Principles

The goal of the Principles is to provide incentives for the early and informal information exchange on commonly encountered issues relating to evidence preservation and discovery, paper and electronic, as required by Federal Rule of Civil Procedure 26(f)(2). The Principles provide guidance on how to streamline the discovery process (e.g., suggesting formats of electronic discovery which are generally not required to be preserved, thus requiring a party to discuss the need for such formats early in the pretrial litigation process) and how to resolve disputes regarding electronic discovery.

The Principles also contain novel ideas, such as the use of e-discovery liaisons, to assist parties in efficiently managing discovery, particularly discovery involving complex electronically stored information. The Principles have generated a tremendous amount of interest in the legal community nationally.

Principles

Model Standing Order [pdf | MS Word]

Phase One Report [Appendix, Report]

Judges Participating in Phase Two

Interim Report On Phase Two

News

- Top ten e-discovery developments and trends in 2011
- 7th Circuit Pilot Program Could Have Wide-Ranging Impact
- The 7th Circuit E-Discovery Pilot Project: What We Might Learn and Why It Matters to Every Litigant in America

more

Subcommittees

- Education
- Membership
- Communications and Outreach
- Preservation
- Early Case Assessment
- Surveys
- Website
- Technology

Discovery Pilot
Seventh Circuit Electronic Discovery Pilot Program

About the Committee

History

The Seventh Circuit Electronic Discovery Pilot Program Committee ("Committee") was formed in May 2009 to conduct a multi-year, multi-phase process to develop, implement, evaluate, and improve pretrial litigation procedures that would provide fairness and justice to all parties while seeking to reduce the cost and burden of electronic discovery consistent with Rule 1 of the Federal Rules of Civil Procedure. To that end we brought together the most talented experts in the Seventh Circuit from all sectors of the bar, including government lawyers, plaintiffs' lawyers, defense lawyers, and in house lawyers from companies with large information systems, as well as experts in relevant fields of technology. These experts developed Principles Relating to the Discovery of Electronically Stored Information ("Principles"), and a Standing Order by which participating judges implement the Principles in the Pilot Program test cases.

The Committee conducted Phase 1 of the Pilot Program from October 2009 through March 2010, and unveiled its detailed Report on Phase 1 at last year's Seventh Circuit Bar Association meeting. In order to provide an early indication of any needed adjustments, Phase 1 was limited in duration and the Phase 1 Report provides only a partial and initial "snapshot" of how the Principles appeared to be working in practice. The full report is available at www.DiscoveryPilot.com. In summary, the participating judges overwhelmingly felt that the Principles were having a positive effect on counsel's attention to and knowledge about relevant technology when addressing electronic discovery issues with the Court. In particular, the judges felt that the involvement of e-discovery liaisons required by Principle 2.02 contributes to a more efficient discovery process. Many of the participating lawyers reported little impact on their cases, presumably mostly because of the limited duration of Phase 1. But those who did feel an effect from the Principles overwhelmingly reported that it was positive in terms of promoting fairness, fostering more amicable dispute resolution, and facilitating zealous advocacy on behalf of their clients.

The Committee is engaged in the two-year long Phase 2 of the Pilot Program. The Committee intends to present its Final Report on Phase Two in 2012, before moving on to Phase Three.

Membership

The Committee functions through its dedicated volunteer members. Members include practicing attorneys, judges, and others active in litigation support and the ediscovery field, including academics and consultants. Potential members are screened by the Membership Subcommittee. Most, but not all members possess a J.D., but ediscovery vendors also share their talents with the Committee, working with the Technology Subcommittee. Members may be nominated by current members, or may self-nominate. For more information on membership, see the Membership Subcommittee page, or contact one of the Membership Subcommittee Co-Chairs.

News

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Discovery Pilot
Seventh Circuit Electronic Discovery Pilot Program

Resources

The Committee fulfills its mission in part by providing education on electronic discovery topics, through the Education Subcommittee.For additional independent, general information about electronic discovery topics, the Committee refers you to The Sedona Conference.

- Webinars
- Cases
- Other Materials
- EDRM.net

Disclaimer: Use of this site is not a substitute for legal research in connection with any pending or potential legal matter. The Seventh Circuit Electronic Discovery Pilot Program will not be liable for any errors or omissions in information contained on this site or for the availability of such information. The Seventh Circuit Electronic Discovery Pilot program will not be liable for any losses, injuries, or damages resulting from the display or use of any information.

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Discovery Pilot
Seventh Circuit Electronic Discovery Pilot Program

In The News

- Pilot Program in the News
- Cases Citing Disc. Pilot Program

News

- Top ten e-discovery developments and trends in 2011
- 7th Circuit Pilot Program Could Have Wide-Ranging Impact
- The 7th Circuit E-Discovery Pilot Project: What We Might Learn and Why It Matters to Every Litigant in America

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Discovery Pilot
Seventh Circuit Electronic Discovery Pilot Program

7th Circuit Cases

- Seventh Circuit E-Discovery Case Law
- Opinions Citing the Seventh Circuit E-Discovery Pilot Program
- Sedona Conference - Federal E-Discovery Case Law - 2010
- Sedona Conference - Federal E-Discovery Case Law - 2011

The Seventh Circuit Pilot Program Committee thanks the Sedona Conference and Ken Withers for making these two excellent resources available to the Pilot Program. These exhaustive compilations of national case law are expertly drafted and we are delighted that they have been kind enough to allow us to include them on our website.

News

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Subcommittees

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- Technology

Discovery Pilot
Seventh Circuit Electronic Discovery Pilot Program

Speakers' Bureau

Members of the 7th Circuit Committee have given over 45 presentations about the Pilot Program in more than 15 states in 2010-2011. Please contact the Communications & Outreach Subcommittee if you need a representative of the Pilot Program to speak on the topic of e-Discovery, the Pilot Program, or the 7th Circuit E-Discovery Principles at any upcoming events.

Seventh Circuit Communications and Outreach:

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National Communications and Outreach:

Arthur Gollwitzer
Floyd & Buss LLP
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Austin, TX 78735
agollwitzer@fblawllp.com
512-681-1504

Below is just a sample of the presentations given by members of the Committee:

May 9, 2012 - Chicago, IL
CHICAGO BAR ASSOCIATION, YOUNG LAWYER SECTION CORPORATE PRACTICE SEMINAR

George Bellas, Senior Partner, Bellas & Wachowski
"E-Discovery Considerations for the Modern Practice"

May 4, 2012 - Chicago, IL
ISBA TORT LAW SECTION SEMINAR

George Bellas, Senior Partner, Bellas & Wachowski
"Illinois Supreme Court Rules and Federal Rules in Pretrial Discovery"

Sean Byrne, Project Leadership Associates
"Introduction to E-Discovery"

April 2012 - Chicago, IL
DRI - LIFE, HEALTH, DISABILITY AND ERISA CLAIMS SEMINAR

News

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Magistrate Judge Nan R. Nolan, U.S. District Court for the Northern District of Illinois
"Emerging Trends in E-Discovery"

March 1, 2012 - Chicago, IL
ISBA

Chief Judge James F. Holderman, U.S. District Court for the Northern District of Illinois
"e-Techonology in the Courthouse: Present & Future"

George Bellas, Senior Partner, Bellas & Wachowski
"e-Discovery and Preserving Electronic Data for Trial in the 21st Century"

February 29, 2012 - Philadelphia, PA
Q1 PRODUCTIONS

Michael Bolton, Senior Counsel, Baxter International
"7th Circuite E-Discovery Pilot Program: E-Discovery in the Beginning"

February 8, 2012 - Chicago, IL
CHICAGO BAR ASSOCIATION, TORT LAW COMMITTEE

George Bellas, Senior Partner, Bellas & Wachowski
"e-Discovery and Preserving Electronic Data for Trial in the 21st Century"

November 2011 - Palatine, IL
NORTHWEST SUBURBAN BAR ASSOCIATION

George Bellas, n, Partner, Pugh, Jones, Johnson & Quandt, P.C.
"Practical Applications for E-Discovery in Smaller Cases"

November 2011 - Chicago, IL
CHICAGO BAR ASSOCIATION

Tiffany M. Ferguson, Partner, Pugh, Jones, Johnson & Quandt, P.C.
"Employment Law: The Role of Social Media"

October 2011 - Chicago, IL
LOYOLA UNIVERSITY SCHOOL OF LAW - *E-DISCOVERY AND DISPUTE RESOLUTION; MEDIATION, ARBITRATION AND COURT PROGRAMS*

Arthur J. Howe, Partner, Schopf & Weiss LLP
Christina Zachariasen, Associate Director, Disputes & Investigations, Navigant Consulting
"7th Circuit Pilot Program"

May 2011 - Milwaukee, IL
7TH CIRCUIT BAR ASSOCIATION AND JUDICIAL CONFERENCE OF THE 7TH CIRCUIT MEETING

Chief Judge James F. Holderman, U.S. District Court for the Northern District of Illinois
"Seventh Circuit Electronic Discovery Pilot Program - Phase Two Interim Report"

May 2011 - Chicago, IL
7TH CIRCUIT E DISCOVERY PILOT PROGRAM EVENT WITH THE GENERAL COUNSEL OF THE ILLINOIS CHAMBER OF COMMERCE

Chief Judge James F. Holderman, U.S. District Court for the Northern District of Illinois

May 2011 – Chicago, IL
CHIEF LITIGATION COUNSEL ASSOCIATION

Alex Buck, Special Counsel, Bartlit Beck Herman Palenchar & Scott LLP
"E-Discovery Update for Chief Litigation Counsel – Executive Overview of Recent Legal Developments and Discussion of Current Practice Management Issues"

May 2011 – Chicago, IL
DRI – DRUG AND MEDICAL DEVICE SEMINAR

Teresa Cotton Santos, Assistant General Counsel, Eli Lilly and Company
John Martin, Partner, Nelson Mullins Riley & Scarborough LLP
"Websites, Texting and Tweets – Oh My!: Managing Technology Risks of the Drug and Device Companies"

April 2011 – Madison, WI
MADISON BAR ASSOCIATION

Magistrate Judge Nan R. Nolan, U.S. District Court for the Northern District of Illinois
James McKewon, Partner, Foley & Lardner LLP
"The Seventh Circuit E-Discovery Pilot Program"

April 2011 – Chicago, IL
ADVOCATES SOCIETY ON E-DISCOVERY

George S. Bellas, Partner, Bellas & Wachowski
"7th Circuit E-Discovery Pilot Program and Principles"

April 2011 – Merrill Corporation Webinar
7TH CIRCUIT E-DISCOVERY PILOT PROGRAM EDUCATIONAL SERIES

"E-Discovery Practical Guide: What Everyone Should Know About the Mechanics of eDiscovery Applications"

April 2011 – Starved Rock State Park, IL
ILLINOIS STATE BAR ASSOCIATION ALLERTON CONFERENCE

George S. Bellas, Partner, Bellas & Wachowski
"Hot Button Civil Evidence Issues"

March 2011 – Chicago, IL
CHICAGO KENT LAW SCHOOL

Michael Bolton, Senior Counsel, Baxter International
Debra Bernard, Partner, Perkins Coie LLP
"7th Circuit E-Discovery Pilot Program: E-Discovery in the Beginning"

March 2011 – Toronto, Canada
2ND ANNUAL EDISCOVERY CANADA

Rueben Hedlund, Counsel, McGuire Woods "The Looming Dangers of E-Discovery"

March 2011 – Wilmington Delaware
11TH ANNUAL CONFERENCE ON WOMEN AND THE PRACTICE OF LAW FOR DUPONT

Alex Buck, Special Counsel, Bartlit Beck Herman Palenchar & Scott LLP
"New Forms of Social Media: What to Expect and How to be Prepared"

March 2011 – Boston, MA
Q1 EDISCOVERY FOR PHARMACEUTICAL AND MEDICAL DEVICE CORPORATIONS

Tiffany M. Ferguson, Partner, Pugh, Jones, Johnson & Quandt, P.C.
"Update on the Seventh Circuit eDiscovery Pilot Program"
Alex Buck, Special Counsel, Bartlit Beck Herman Palenchar & Scott LLP
"Strengthening the Relationship Among In-House and Outside Counsel"

February 2011 - Chicago, IL
JMLS 55TH ANNUAL CONFERENCE ON DEVELOPMENTS IN IP LAW

Chief Judge James F. Holderman, U.S. District Court for the Northern District of Illinois
Keynote Address: "The Future Challenges of IP Litigation: A Judge's Perspective"

February 2011 – Milwaukee, WI
MILWAUKEE BAR ASSOCIATION

Magistrate Judge Nan R. Nolan, U.S. District Court for the Northern District of Illinois
"The Seventh Circuit E-Discovery Pilot Program: Principles and Practical Applications"

December 2010 – Webinar
KROLLONTRACK

Alex Buck, Special Counsel, Bartlit Beck Herman Palenchar & Scott LLP
"Decade of Discovery: Policies, Technology & the Search for Efficiency"

November 2010 - Arlington, VA
GEORGETOWN LAW - 7TH ANNUAL ADVANCED E DISCOVERY INSTITUTE

Chief Judge James F. Holderman, U.S. District Court for the Northern District of Illinois
Keynote Address: "Conquering the Obstacles of E-Discovery - Lessons Learned from the Seventh Circuit Pilot Program"

Magistrate Judge Nan R. Nolan, U.S. District Court for the Northern District of Illinois
"E-Discovery Case Law Update"
"New E-Discovery Initiatives: What Lies Ahead?"

October 2010 – Chicago, IL
PLI Patent Litigation Seminar

Debra R. Bernard, Partner, Perkins Coie LLP
"Recent issues in E-Discovery"

October 2010 – Albuquerque, NM
George S. Bellas, Partner, Bellas & Wachowski
"Creative Uses of E-Discovery in Auto Products Liability Cases"

October 2010 – Washington D.C.
MASTERS CONFERENCE

Alex Buck, Special Counsel, Bartlit Beck Herman Palenchar & Scott LLP "Document Review: Best Practices From the Front Line"

September 2010 – Phoenix, AZ
SEDONA CONFERENCE WORKING GROUP 1 ANNUAL MEETING

Magistrate Judge Nan R. Nolan, U.S. District Court for the Northern District of Illinois
"Case Law and Rules Update"
"Proportionality: A View from the Bench"

September 2010 – Philadelphia, PA
LEGAL IQ E-DISCOVERY CONFERENCE

Michael Bolton, Senior Counsel, Baxter International "Seventh Circuit E-Discovery Pilot Program: E-Discovery in the Beginning"

September 2010 – Chicago, IL
ILLINOIS STATE BAR ASSOCIATION PRO BONO

Magistrate Judge Nan R. Nolan, U.S. District Court for the Northern District of Illinois

September 2010 – Webinar
George S. Bellas, Partner, Bellas & Wachowski
"E-Discovery: The 4th Circuit Principles on E-Discovery"

August 2010 - San Francisco, CA

2010 ABA ANNUAL MEETING

Chief Judge James F. Holderman, U.S. District Court for the Northern District of Illinois "Pro-Active Strategies to Minimize E-Discovery Pain: An Ounce of Prevention"

August 2010 – Chicago, IL
EXECUTIVE COUNSEL INSTITUTE

Alex Buck, Special Counsel, Bartlit Beck Herman Palenchar & Scott LLP
"Effective Cost and Risk Containment Steps"

July 2010 - Washington, DC
CIVIL JUSTICE REFORM GROUP

Chief Judge James F. Holderman, U.S. District Court for the Northern District of Illinois
Keynote Address

June 2010 – Beijing, China
CHINESE-AMERICAN INTERNATIONAL INTELLECTUAL PROPERTY CONFERENCE

Chief Judge James F. Holderman, U.S. District Court for the Northern District of Illinois, "The Effect of Electronic Discovery on United States Pretrial Litigation"

June 2010 – Chicago, IL
LAW BULLETIN DISCOVERY & E-DISCOVERY CONFERENCE

Magistrate Judge Nan R. Nolan, U.S. District Court for the Northern District of Illinois
Michael Kanovitz, Partner, Loevy & Loevy
Tom Lidbury, Partner, Mayer Brown
Karen Quirk, Partner, Winston & Strawn LLP
"The Seventh Circuit E-Discovery Pilot Program"

Alex Buck, Special Counsel, Bartlit, Beck, Herman, Palenchar & Scott LLP
"E-Discovery: Third Party Data, Social Media and Cloud Computing"

May 2010 – Madison, WI
WESTERN DISTRICT BAR ASSOCIATION

Richard Moriarty, Assistant Attorney General, Wisconsin Department of Justice "Pilot Program Update"

May 2010 - Webinar
ACEDS

Tiffany M. Ferguson, Partner, Pugh, Jones, Johnson & Quandt, P.C.
Arthur Howe, Parnter, Schopf & Weiss LLP
Jeffrey C. Sharer, Partner, Sidley Austin LLP
"The 7th Circuit Electronic Discovery Pilot Program"

May 2010 - Chicago, IL
7TH CIRCUIT BAR ASSOCIATION AND JUDICIAL CONFERENCE OF THE 7TH CIRCUIT MEETING

Chief Judge James F. Holderman, U.S. District Court for the Northern District of Illinois, "Electronic Discovery: A New Decade, A New Approach"

Magistrate Judge Nan R. Nolan, U.S. District Court for the Northern District of Illinois
"Electronic Discovery Judges Panel"

May 2010 - Durham, NC
JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES
2010 CIVIL LITIGATION CONFERENCE AT DUKE UNIVERSITY

Chief Judge James F. Holderman, U.S. District Court for the Northern District of Illinois
Luncheon Address

May 2010 – Chicago, IL
MER CONFERENCE

Magistrate Judge Nan R. Nolan, U.S. District Court for the Northern District of Illinois
Steven Teppler, Partner, Edelson McGuire, LLC
Keynote Address: "The New Legal Realities for Electronic Records Management"

May 2010 – Chicago, IL
ALI-ABA 1ST ANNUAL ELECTRONIC DISCOVERY AND DIGITAL EVIDENCE PRACTITIONER'S WORKSHOP

Magistrate Judge Nan R. Nolan, U.S. District Court for the Northern District of Illinois
Keynote Address: "7th Circuit's E-Discovery Pilot Program Phase I"

Alex Buck, Special Counsel, Bartlit Beck Herman Palenchar & Scott LLP
Stephen Teppler, Partner, Edelson McGuire
"Practitioners' Update: Practicing ESI by the Numbers"

April 2010 – New York, NY
ABA Section of International Law Annual Meeting

Debra R. Bernard, Partner, Perkins Coie LLP
"Rules of Engagement: Avoiding the Pitfalls in Cross Border Electronic Discovery"

April 2010 – TCDI Webinar
7TH CIRCUIT E-DISCOVERY PILOT PROGRAM EDUCATIONAL SERIES

Michael Bolton, Senior Counsel, Baxter Healthcare Corp.
Tiffany Ferguson, Partner, Pugh, Jones, Johnson & Quandt
Chris King, Partner, Sonnenschein, Nath & Rosenthal
Tom Staunton, Partner, Miller Shakman & Beem
"You & Your Clients: Communicating About E-Discovery"

February 2010 – Webinar
ILLINOIS TRIAL LAWYERS ASSOCIATION

George S. Bellas, Partner, Bellas & Wachowski
"E-Discovery: Get in Step with the 21st Century"

February 2010 – TCDI Webinar
7TH CIRCUIT E-DISCOVERY PILOT PROGRAM EDUCATIONAL SERIES

Chief Judge James F. Holderman, U.S. District Court for the Northern District of Illinois Magistrate Judge Nan R. Nolan, U.S. District Court for the Northern District of Illinois
Tom Lidbury, Partner, Mayer Brown LLP
Alex Buck, Sr. Counsel & Director E-Discovery & Records Management, Abbott Laboratories "Reforming Discovery: The Seventh Circuit E-Discovery Pilot Program"

November 2009 – Chicago, IL
INN OF COURT

Chief Judge James F. Holderman, U.S. District Court for the Northern District of Illinois Magistrate Judge Nan R. Nolan, U.S. District Court for the Northern District of Illinois
Tom Lidbury, Partner, Mayer Brown LLP
Tiffany Ferguson, Partner, Pugh, Jones, Johnson & Quandt, P.C.
Natalie J. Spears, Partner, Sonnenschein Nath & Rosenthall LLP
Alex Buck, Sr. Counsel & Director E-Discovery & Records Management, Abbott Laboratories "Report on Seventh Circuit E-Discovery Pilot Program"

Discovery Pilot
Seventh Circuit Electronic Discovery Pilot Program

Surveys

The Seventh Circuit Electronic Discovery Pilot Program issued its Report on Phase One in May 2010, which is **available here** [Appendix, Report]. The Phase One Report sets forth the results of the survey conducted by the Survey Subcommittee of those who participated in Phase One of the Program.

The **Phase One Survey** [Appendix, Report], was conducted in February and March 2010 to assess the initial effectiveness of the Principles and gather feedback and information from the lawyers and judges participating in Phase One of the Pilot Program. The Subcommittee received tremendous assistance and support from the Institute for Advancement of the American Legal System at the University of Denver (IAALS), which led the development of the Phase One survey questionnaire and assisted with analysis of the survey results. The FJC administered the survey and provided vital input during the survey questionnaire development process. Given the nature and brief length of the first phase of the Pilot Program, the Phase One Survey was designed to be an evaluation and information-gathering tool, administered through a self-report questionnaire, in order to obtain perceptions of the procedures from the participants in the Program and assess satisfaction with the Principles and processes surrounding the Principles.

To this end, the Survey subcommittee ultimately designed two survey questionnaires for Program participants -- one for attorneys and one for judges. Copies of the survey questionnaires are **attached here** [Judge Questionnaire, Attorney Questionnaire]. Beginning on February 16, 2010, the Phase One Survey questionnaires were sent by email to the lead counsel listed for each party in the ninety-three (93) cases in the Pilot Program, as well as the thirteen (13) judges of the U.S. District Court for the Northern District of Illinois who implemented the Principles in those cases. A total of two hundred eighty-five (285) lead attorneys received an email with a link to the Survey; the Survey instructions requested that only one counsel per party respond for each case, and, accordingly, that either the lead attorney or the lawyer on the team with the most knowledge of the ediscovery in the case complete the Survey. Survey questionnaire responses were collected until March 7, 2010. All thirteen (13) judges responded. One hundred and twenty-six (126) attorneys, slightly more than forty-four percent (44%), also responded to questionnaires. The completed questionnaires were then sent by the FJC to the IAALS in Denver for processing and analysis. The results of the Phase One survey were published with the **Phase One Report** [Appendix, Report] in May 2010.

As the goal of the Seventh Circuit Electronic Pilot Program is service to the public, to the judiciary, to the bar and to the litigants, feedback is important to the Committee. The Committee expects to conduct a survey after each major initiative the Committee undertakes. Surveys are conducted in cooperation with the Federal Judicial Center in Washington DC, which is the educational arm of the United States Courts. In August of 2010, the Survey SubCommittee worked with the FJC to develop and administer a baseline survey of ECF users in the district courts of the Seventh Circuit.. The baseline survey was completed by over 6,000 attorneys and will be utilized and published in connection with the comprehensive survey planned for the end of Phase II in 2012.

For information concerning the activities of the Survey Subcommittee, please contact either of its Co-Chairs.

Joanne McMahon
Governmental Compliance Leader
General Electric
500 West Monroe Street

Natalie Spears
SNR Denton US LLP
233 South Wacker Drive
Suite 7800

News

- Top ten e-discovery developments and trends in 2011
- 7th Circuit Pilot Program Could Have Wide-Ranging Impact
- The 7th Circuit E-Discovery Pilot Project: What We Might Learn and Why It Matters to Every Litigant in America

more

Subcommittees

- Education
- Membership
- Communications and Outreach
- Preservation
- Early Case Assessment
- Surveys
- Website
- Technology

Chicago, Illinois 60661
Joanne.mcmahon@ge.com
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Chicago, IL 60606
Natalie.spears@snrdenton.com
312-876-2556

D. Education Webinars and Live Seminars

1. February 17, 2010

"Re-forming Discovery: The Seventh Circuit E-Discovery Pilot Program"

Reforming Discovery: The Seventh Circuit E-Discovery Pilot Program

Use of the Seventh Circuit E-Discovery Principles to Improve Your Discovery Processes

Presented by:
Technology Concepts & Design, Inc.

Panelists

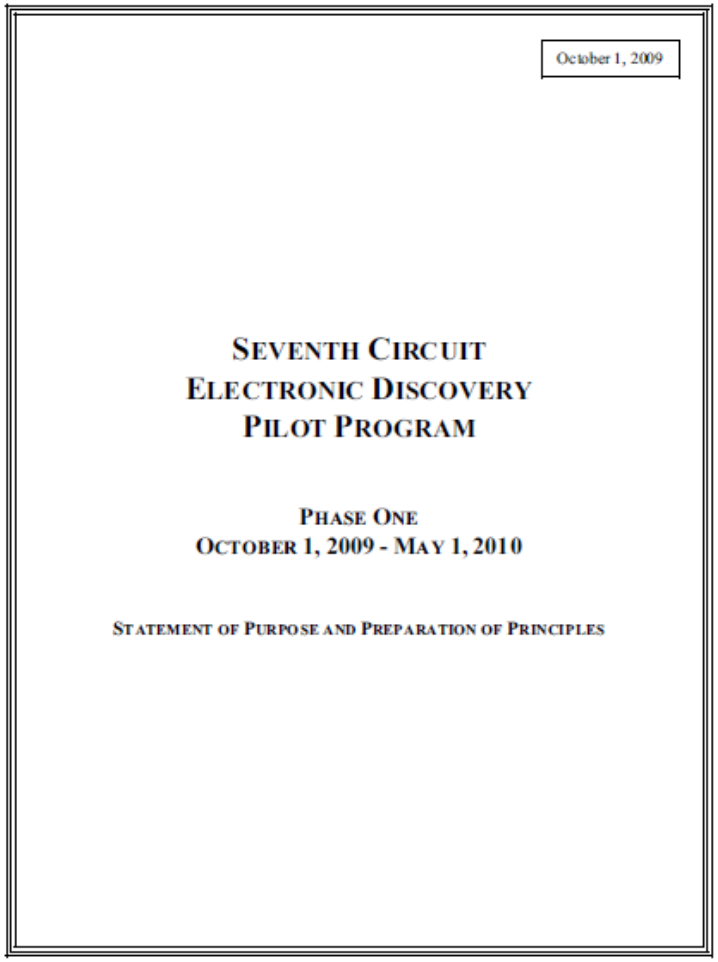
Chief Judge James F. Holderman
Chief District Judge, U.S. District Court Northern District of Illinois

Hon. Nan R. Nolan
U. S. Magistrate Judge, U.S. District Court Northern District of Illinois

Tom Lidbury
Partner, Mayer Brown LLP

Alexandra Buck
Senior Counsel & Dir. of eDiscovery & Records Management, Abbott Labs

7th Circuit E-Discovery Pilot Program



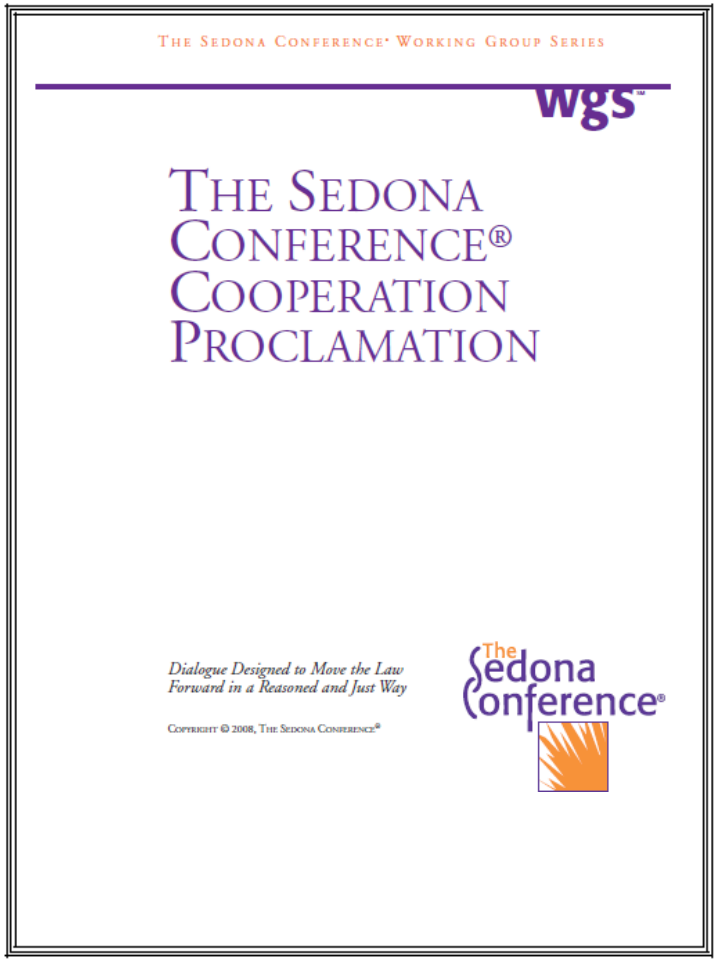
October 1, 2009

SEVENTH CIRCUIT
ELECTRONIC DISCOVERY
PILOT PROGRAM

PHASE ONE
OCTOBER 1, 2009 - MAY 1, 2010

STATEMENT OF PURPOSE AND PREPARATION OF PRINCIPLES

The Sedona Proclamation



Rule 26(f) Conference of the Parties; Planning for Discovery

26(f)(2) parties must **"discuss any issues about preserving discoverable information; and develop a proposed discovery plan"**

26(f)(3)(C) discovery plan must state the parties' views and proposals on **"any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced"**

These requirements give little guidance about what "issues" to discuss concerning preservation or discovery

In practice, it is common for parties to avoid discussion at any meaningful level

The Principles:

1. Identify specific topics that should be
   A. Investigated and understood by counsel before the Rule 16 conference; and
   B. Addressed in the meet-and-confer process before the Rule 16 conference
2. Incentivize a more open exchange by requiring that these issues be raised promptly if there is disagreement (or the aggrieved party may not be heard later)

.

Principle 2.01
Duty to Meet & Confer on Discovery & to Identify Disputes for Early Resolution

(a) Prior to the initial status conference with the Court, counsel shall meet and discuss the application of the discovery process set forth in the Federal Rules of Civil Procedure and these Principles to their specific case. Among the issues to be considered for discussion are:

(1) the **identification** of relevant and discoverable ESI;

(2) the **scope** of discoverable ESI to be preserved by the parties;

(3) the **formats** for preservation and production of ESI;

(4) the potential for conducting discovery in phases or stages as a method for reducing costs and burden; and

(5) the procedures for handling inadvertent production of privileged information and other privilege waiver issues under Rule 502 of the Federal Rules of Evidence.

This Principle identifies general topics, while other Principles give more specific guidance:

Principle 2.05 provides more guidance on “identification” issues

Principle 2.04 provides specific issues concerning “preservation” issues

Principle 2.06 provides more guidance on “format” issues

Principle 2.01
Duty to Meet & Confer on Discovery & to Identify Disputes for Early Resolution

(b) Disputes regarding ESI that counsel for the parties are unable to resolve **shall be** presented to the Court **at the initial status** conference, Fed. R. Civ. P. Rule 16(b) Scheduling Conference, **or as soon as possible thereafter**.

Disputes that can reasonably be identified by meaningful discussion before the initial status MUST be raised by the initial status

Disputes that are only identifiable later MUST be brought up promptly

The teeth to this is that failing to do so risks the Court refusing to hear the aggrieved party later

Principle 2.01
Duty to Meet & Confer on Discovery & to Identify Disputes for Early Resolution

(c) Disputes regarding ESI will be resolved more efficiently if, before meeting with opposing counsel, the attorneys for each party review and understand how their client's data is stored and retrieved in order to determine what issues must be addressed during the meet and confer discussions.

To fulfill these requirements of the Principles counsel must actively investigate and understand their clients' information systems

Otherwise meaningful discussion is not possible

Principle 2.02
E-Discovery Liaison(s)

In most cases, the meet and confer process will be aided by participation of **an e-discovery liaison(s)** as defined in this Principle. In the event of a dispute concerning the preservation or production of ESI, each party shall designate an individual(s) to act as e-discovery liaison(s) for purposes of meeting, conferring, and attending court hearings on the subject. Regardless of whether the e-discovery liaison(s) is an attorney (in-house or outside counsel), a third party consultant, or an employee of the party, the e-discovery liaison(s) must:

(a) be prepared to participate in e-discovery dispute resolution;

(b) be knowledgeable about the party's e-discovery efforts;

(c) be, or have reasonable access to those who are, familiar with the party's electronic systems and capabilities in order to explain those systems and answer relevant questions; and

(d) be, or have reasonable access to those who are, knowledgeable about the technical aspects of e-discovery, including electronic document storage, organization, and format issues, and relevant information retrieval technology, including search methodology.

Principle 2.02
E-Discovery Liaison(s) Summary

Principle 2.02

- One or more people with knowledge of data systems, hold and collection processes
- Main point of contact for data issues for parties and bench

Benefits of the Liaison

- Encourages meaningful communication between parties
- Allows centralization of information pertaining to e-discovery
- Helps cooperation and dialogue between the “experts”
- Broad enough to allow more than one liaison depending on the circumstance
- Many corporations have this role internally already

Things to watch out for

- Need someone who is comfortable with *both* legal and IT issues
- Face of client for the court
- Need someone who is cooperative, but knows your limitations

Principle 2.04
Scope of Preservation

(a) Every party to litigation and its counsel are responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control. Determining which steps are reasonable and proportionate in particular litigation is a fact specific inquiry that will vary from case to case. The parties and counsel should address preservation issues at the outset of a case, and should continue to address them as the case progresses and their understanding of the issues and the facts improves.

(b) Discovery concerning the preservation and collection efforts of another party may be appropriate but, if used unadvisedly, can also contribute to the unnecessary expense and delay and may inappropriately implicate work product and attorney-client privileged matter. Accordingly, prior to initiating such discovery a party shall confer with the party from whom the information is sought concerning: (i) the specific need for such discovery, including its relevance to issues likely to arise in the litigation; and (ii) the suitability of alternative means for obtaining the information. Nothing herein exempts deponents on merits issues from answering questions concerning the preservation and collection of their documents, ESI, and tangible things.

(c) The parties and counsel should come to the meet and confer conference prepared to discuss the claims and defenses in the case including specific issues, time frame, potential damages, and targeted discovery that each anticipates requesting. In addition, the parties and counsel should be prepared to discuss reasonably foreseeable preservation issues that relate directly to the information that the other party is seeking. The parties and counsel need not raise every conceivable issue that may arise concerning its preservation efforts; however, the identification of any such preservation issues should be specific.

Principle 2.04
Scope of Preservation

(d) The following categories of ESI generally are not discoverable in most cases, and if any party intends to request the preservation or production of these categories, then that intention should be discussed at the meet and confer or as soon thereafter as practicable:

(1) "deleted," "slack," "fragmented," or "unallocated" data on hard drives;

(2) random access memory (RAM) or other ephemeral data;

(3) on-line access data such as temporary internet files, history, cache, cookies, etc.;

(4) data in metadata fields that are frequently updated automatically, such as last-opened dates; and

(5) backup data that is substantially duplicative of data that is more accessible elsewhere;

(6) other forms of ESI whose preservation requires extraordinary affirmative measures that are not utilized in the ordinary course of business.

(e) If there is a dispute concerning the scope of a party's preservation efforts, the parties or their counsel must meet and confer and fully explain their reasons for believing that additional efforts are, or are not, reasonable and proportionate, pursuant to Rule 26(b)(2)(C). If the parties are unable to resolve a preservation issue, then the issue should be raised promptly with the Court.

Principle 2.04
Scope of Preservation Summary

Principles intend to focus the data that must be preserved and collected

Example: Company XYZ

2.5 GB/employee

10,000 Employees on Legal Hold

Result of a Simultaneous Collection:

- $12 - $16M to process for review
- 5 1/3 days per attorney to review 1GB of data working 7-hr days
- Over 33,000 days to review data (Assuming 75% culled out during processing)
- At $250/hr, it would cost is apx. $60M to review the data

Takeaway: Focusing holds to cut down preservation of unnecessary data is crucial

Principle 2.04
Scope of Preservation

(b) Discovery concerning the preservation and collection efforts of another party may be appropriate but, if used unadvisedly, can also contribute to the unnecessary expense and delay and may inappropriately implicate work product and attorney-client privileged matter. Accordingly, prior to initiating such discovery a party shall confer with the party from whom the information is sought concerning: (i) the specific need for such discovery, including its relevance to issues likely to arise in the litigation; and (ii) the suitability of alternative means for obtaining the information. Nothing herein exempts deponents on merits issues from answering questions concerning the preservation and collection of their documents, ESI, and tangible things.

Principle 2.03
Preservation Requests and Orders

(b) To the extent counsel or a party requests preservation of ESI through the use of a preservation letter, such requests should attempt to ensure the preservation of relevant and discoverable information and to facilitate cooperation between requesting and receiving counsel and parties by transmitting specific and useful information. Examples of such specific and useful information include, but are not limited to:

(1) names of the parties;

(2) factual background of the potential legal claim(s) and identification of potential cause(s) of action;

(3) names of potential witnesses and other people reasonably anticipated to have relevant evidence;

(4) relevant time period; and

(5) other information that may assist the responding party in assessing what information to preserve.

Principle 2.03
Preservation Requests

- Don't make vague overreaching demands – these are "disfavored," See Principle 2.03(a)
- However, if you have "specific and useful information" then share it
- That means providing information that will help one's opponent identify the **subset** of information that it should preserve
- Flesh out the factual and legal issues and the types of evidence you think you may want
- Identify specific employees or agents of whom you know and who you think may have relevant information that should be preserved
- Flesh out the time period you consider relevant
- Offer up any other information that you may have that will help identify what should be preserved

Principle 2.03
Preservation Responses

(c) If the recipient of a preservation request chooses to respond, that response should provide the requesting counsel or party with useful information regarding the preservation efforts undertaken by the responding party. Examples of such useful and specific information include, but are not limited to, information that:

(1) identifies what information the responding party is willing to preserve and the steps being taken in response to the preservation letter;

(2) identifies any disagreement(s) with the request to preserve; and

(3) identifies any further preservation issues that were not raised.

Principle 2.03(c) Preservation Requests & Orders Summary

- Gives parties guidance to set the standard for what is reasonable
- Non-response does not equal waiver
- Encourages parties to respond in order to focus preservation effort
  - Will start dialogue with other side
  - Will help proactive parties set the terms

Principle 2.05
Identification of ESI

(a) At the Rule 26(f) conference or as soon thereafter as possible, counsel or the parties shall discuss potential methodologies for identifying ESI for production.

(b) Topics for discussion may include, but are not limited to, any plans to:

(1) eliminate duplicative ESI and whether such elimination will occur only within each particular custodian's data set or whether it will occur across all custodians;

(2) filter data based on file type, date ranges, sender, receiver, custodian, search terms, or other similar parameters; and

(3) use keyword searching, mathematical or thesaurus-based topic or concept clustering, or other advanced culling technologies.

Principle 2.05
Goals

- Discuss each party's plan for using technology to cull the data
- De-duplication – within custodian or across dataset
- File type filters – e.g., system files, music files, etc.
- Date restrictions
- Sender/receiver restrictions
- Boolean searches
- Potential use of advanced culling technology
- Bayesian or statistical concept clustering
- Thesaurus based concept searching

Rule34(b)(2)

****

(D) Responding to a Request for Production of Electronically Stored Information. The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form — or if no form was specified in the request — the party must state the form or forms it intends to use.

(E) *Producing the Documents or Electronically Stored Information*. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.

Principle 2.06
Production Format

(a) At the Rule 26(f) conference, counsel or the parties should make a good faith effort to agree on the format(s) for production of ESI (whether native or some other reasonably usable form). If counsel or the parties are unable to resolve a production format issue, then the issue should be raised promptly with the Court.

(c) ESI stored in a database or a database management system often can be produced by querying the database for discoverable information, resulting in a report or a reasonably usable and exportable electronic file for review by the requesting counsel or party.

(e) ESI and other tangible or hard copy documents that are not text-searchable need not be made text-searchable.

(d) Generally, the requesting party is responsible for the incremental cost of creating its copy of requested information. Counsel or the parties are encouraged to discuss cost sharing for optical character recognition (OCR) or other upgrades of paper documents or non-text-searchable electronic images that may be contemplated by each party.

Principle 2.06
Production Format

The Principles do not elaborate on what is a reasonably usable non-native production format

The Principles do:

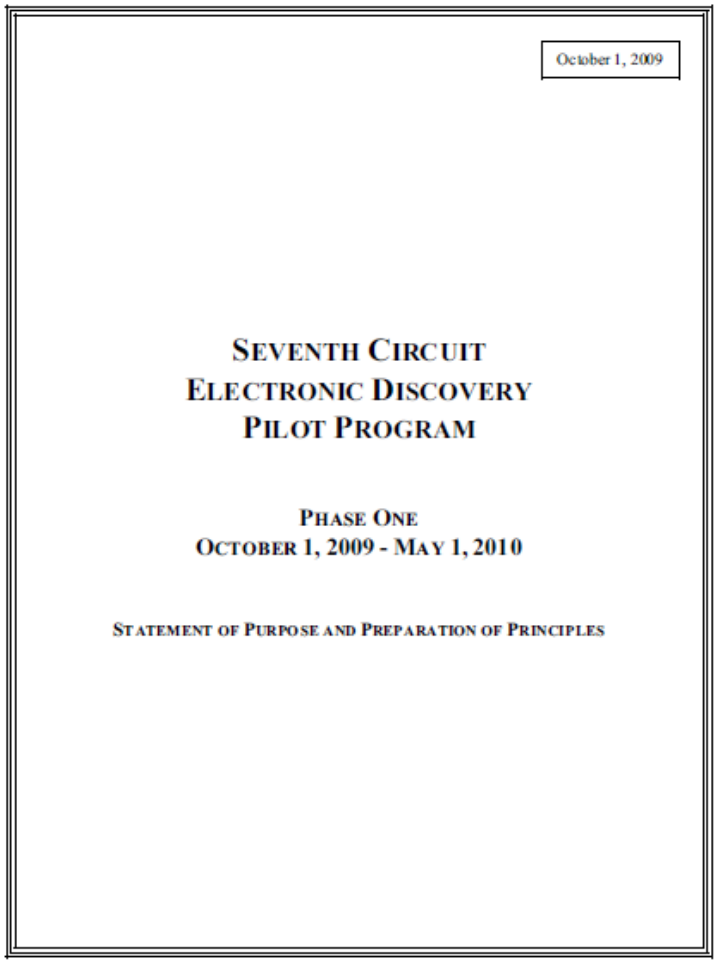
(a) encourage requesting parties to consider using existing database reporting features rather than demanding native data

- It can be complex to recreate a database
- There may be complex authentication issues with reports generated by the recreated database

(b) take the position that a party producing documents that are in a native form that is not text searchable (e.g., paper or an electronic image form) need not pay to “upgrade” to an electronically searchable form

However, the Principles do encourage cooperation and cost sharing

7th Circuit E-Discovery Pilot Program



October 1, 2009

SEVENTH CIRCUIT
ELECTRONIC DISCOVERY
PILOT PROGRAM

PHASE ONE
OCTOBER 1, 2009 - MAY 1, 2010

STATEMENT OF PURPOSE AND PREPARATION OF PRINCIPLES

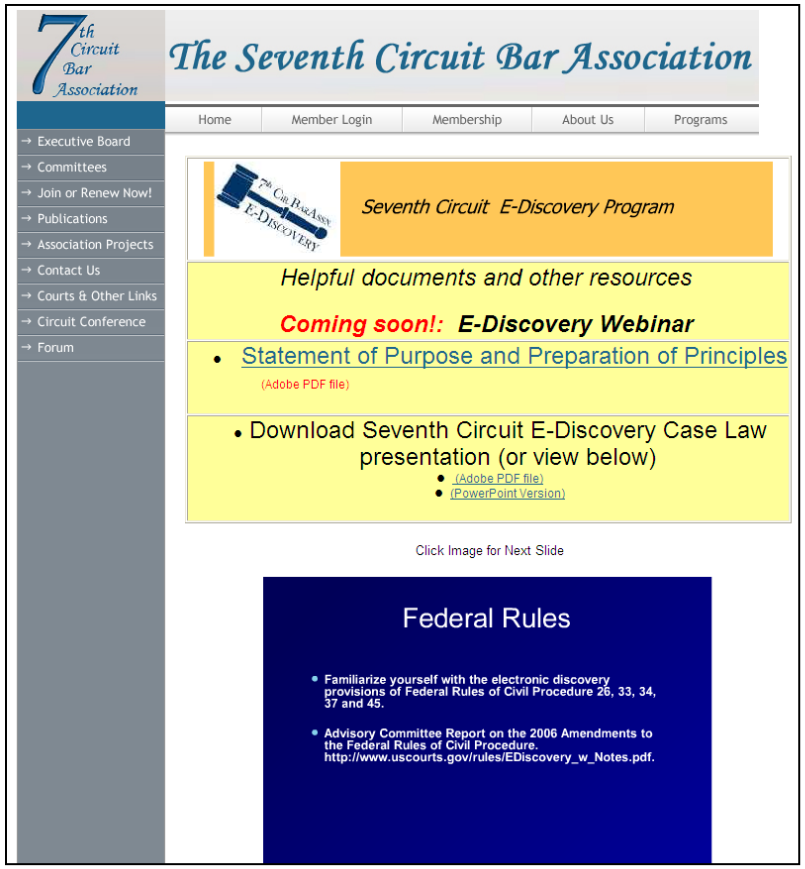
What's Next?

Phase 1 = Snapshot

- Survey March 3rd
- Chicago, May 2-4, 2010
- Duke University, May 10-11, 2010

Phase 2

Further Useful Links



www.7thcircuitbar.org

www.ilnd.uscourts.gov

www.tcdi.com

2. April 28, 2010

"You and Your Client:
Communicating about E-Discovery"

You & Your Clients: Communicating About E-Discovery

- First Webinar: Reforming Discovery: Use of the 7th Circuit E-Discovery Principles to Improve Your Discovery Processes

View Webcast Now >

View On-Demand at www.tcdi.com

- Today's Panelists

Michael Bolton
Baxter Healthcare Corp.
Senior Counsel

Tiffany Ferguson
Pugh, Jones, Johnson & Quandt, Partner

Chris King
Sonnenschein Nath & Rosenthal, Partner

Tom Staunton
Miller Shakman & Beem Partner

Vickie Redgrave
TCDI, General Counsel & VP Practice Development

Why is E-Discovery Communication Important?

- Every computer system is unique
- Clients know their systems best, Counsel knows legal issues and standards best
- Strong communication enables you to leverage what both parties bring to the table

Counsel, Educate Yourself!

- 7th Circuit E-Discovery Pilot Program Principles
  - www.7thcircuitbar.org
  - www.tcdi.com
- Proposed Standing Order Relating to the Discovery of ESI
- E-Discovery Amendments and Committee Notes to the 2006 Rules
  - www.uscourts.gov/rules/congress0406.html
- The Sedona Conference® Cooperation Proclamation
  - www.thesedonaconference.org
- Georgetown Law E-Discovery Law Blog
  - www.law.georgetown.edu/cleblog/

Suggestions for Working With Clients New to E-Discovery

- Educate your client
  - Do not be over technical
  - Listen to your client: About systems and cost-related concerns
- Explain the obligation and scope through a series of conversations to gain a common understanding of:
  - Data Volume
  - How its created, stored and overwritten
  - Cost of process
- Counsel and advise
  - Aid in assembling internal and external teams
  - Do not play “gotcha” with your client

Why the Emphasis on EARLY Discussions

- Courts see results of delay – they understand consequences of poor communication
  - Motions for sanctions
  - Cost of re-collection, additional discovery
- Issues in discovery motions could have been resolved if issues addressed sooner
  - Breadth of preservation
  - Collection format

How Principles Encourage EARLY Discussion

- Principle 2.01(a) – Parties should discuss electronic discovery with their opponents *before* the initial status conference
- Principle 2.01(c) – Counsel should speak with their clients before meeting with opposing counsel
- Principle 2.01(d) – Courts can require additional discussions or impose sanctions if a party is not a good faith participant in the process

Where to Start?

- Look at allegations & issues, including damages and defenses
  - Principle 2.04 requires a party to identify the specific need for E-discovery sought.
  - Principle 2.03 provides that vague and overbroad preservation orders should not be entered.
- Indentify key people – the internal team
  - Custodians
  - IT Professionals
- Determine where relevant information is stored
- Consider going to see your client's systems. Observations may allow you to consider information sources that your client may not have considered
  - Telephone systems
  - Mobile devices

Types of Data Stores to Consider

- Defining some terms:

Data Stores	Data Types
• Servers	• Email
• Workstation	• Loose files
• Removable media	• Structured data

- Talking points for practitioners:
  - Email
  - Location and types of loose files
  - Web pages
  - Location(s) of structured data and how data is organized
  - Other data types (ex. CAD files)

Identifying Key People in Large Enterprises

- Employees with relevant ESI
  - Employees with knowledge of relevant facts tend to own relevant ESI
  - Examples:
    - Contract case, look at employees involved in drafting and negotiating
    - Employment case, look at decision makers, HR, etc.
  - Think Rule 26(a) disclosure list +

- Employees with knowledge of computer systems (IT Professionals)
  - Examples of systems:
    - Email
    - Shared networks
    - Employee workstations
    - Structured data
  - Leverage their knowledge of systems and their familiarity with company policies and procedures
  - Who: IT Professionals (Larger Enterprise), Business Managers/ Department Heads (Smaller Organization)

E-Discovery Communication with Clients

- Learn your client's policies and procedures for E-discovery (ex: how they handle legal holds)
- Due diligence includes
  - Educating yourself
  - Understanding client's culture
  - Understand client's level of sophistication
  - Factor in the nature of the case
- Remind clients that E-discovery efforts must be documented and defensible

Principle 2.04 and Proportionality

- Principle 2.04 requires e-discovery obligations should be in proportion to the significance of the litigation
  - Proportionality factors in FRCP 26(b)(2)(C)
  - Learn client's cost of retaining/producing material
  - Learn impact on client's business of retaining/producing material
- Educate clients on the risks of E-discovery mistakes
  - Morgan Stanley (Florida, billion dollar verdict exacerbated by discovery violations)
- Educate yourself – Counsel plays an active role in evaluating sufficiency of client's response
  - Qualcom, 539 F. Supp.2d 1214,1239 (2007)(rev'd on other grounds)

Preservation Obligations of Outside Counsel

- Understand importance of due-diligence and conducting your own, independent investigation
- Maintain an ongoing dialogue with your client
  - Open communication can prevent outcomes like Morgan Stanley
  - Issues can typically be addressed if they are handled early!
- Obligations as an “Officer of the Court”
  - Maintain communication with court (ex. When problem arise and the steps you have taken to resolve them)
  - Utilize the necessary internal and external teams in what you represent to the court (ex. You need to know what requests are burdensome and why)
- Locate ESI, preserve and produce responsive matter

Types of Preservation Questions to Ask Your Client

- E-mail:
  - Auto deletion?
  - Mailbox quotas?
- Loose files:
  - Document management systems?
- Databases:
  - Method for input and saving?
  - Overriding policies?
  - Historical records?
- Web pages:
  - Content management system?
- Near-Line Storage
- Back-ups (Addressed in Principle 2.04(d)):
  - Schedule & rotation policy?

How the Principles Address Preservation Letters & Responses

- Preservation is a common law obligation – the Principles do not require the use of letters and responses
- If you are going to use them, letters and responses should provide useful and specific information
  - See Principles 2.03(b) and 2.03(c)
- Decide on an approach with your client and communicate that approach to opposing counsel

Topics to Discuss About the Collection of ESI

- Where and how files are maintained?
  - Particularly the handling of email and loose files
- IT Staff and System Managers who understand practices and procedures
  - Email storage? Archives? Use?
  - Network servers?
  - Defaults that apply to the creation of loose files (collected centrally or from individual hard drives)?
- Individual users who created, used and maintained relevant data
  - How data is created, used and saved?
  - Handheld devices? Synching?
  - Secretary's Role?
  - Home Computers?
- Talk to opposing counsel before you go forward with collection
  - Outline protocol
  - Ask for agreement

Collection of Back-ups?

- Not usually subject to discovery because generally duplicative
- Defining Back-ups: Disaster recovery media intended to be used for the purpose of recreating a particular computer environment
- Why the expense and burden associated with back-ups
  - Data is compressed
  - Environment must be recreated
  - Locating data

Other Types of Data That Can Pose Collection Issues

- Non-standard email platforms
  - Beyond Microsoft Outlook
  - Understand vendor's experience
- Databases/Structured Data Stores
  - Large amounts of data stored by an organization
  - Most databases are unique
  - Not designed to format information for litigation discovery
- Watch for statistical analysis that requires production of raw data
- Make sure you agree on the format of data that will be produced – in writing!

Internal or Outsourced Collection of ESI?

- Depends on nature of case
  - Internal IT staff capabilities
  - Volume of data
  - Number of custodians
  - Complexity of data
  - Sensitivity of collection
  - Affidavits and In-house experts?

- Outside counsel must play a role in reaching decision on whether collection is done internally or outsourced

Production Format

- Rule 34(b)(2), Principle 2.06(a)
- Email and loose files are commonly encountered data types
- Native Files…
  - Can be more complicated
  - Situations when valuable
- Image (TIFF) and load files
  - Allows for bates numbering
  - Include relevant metadata
- Two Concepts:
  - Proportionality
  - Cost-shifting
- Gain agreement on protocol from opposing counsel

Production Format: Think About It While You Are Collecting Data

- Reach an agreement as to production format
  - Principle 2.06 requires the parties to make a good faith effort to agree on formats for production at the Rule 26(f) conference
- Assess how the information is kept
  - Seek to protect the integrity of the data while limiting the burden on your client
- Determine if reports can be run
  - Consider cost sharing where a database is not designed to ordinarily produce responsive reports

E-Discovery Liaisons

- Purpose: To improve communication
- Who should it be?
  - Litigation counsel
  - Paralegal
  - Client representative
  - Consultant
- One, or more than one?
  - Complexity of issues may make more than one prudent
- What is the liaison's role?
  - Know the data types and data stores
  - Communicate accurately

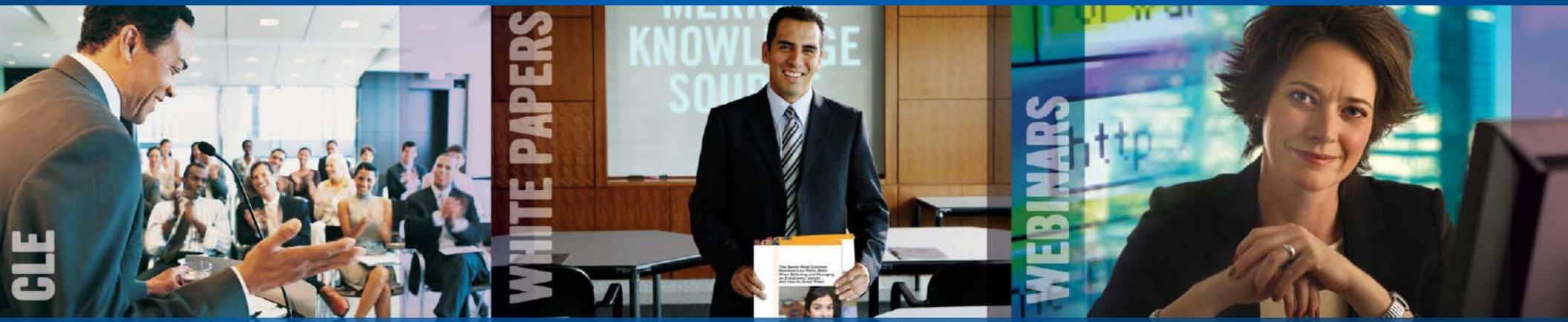
Helpful Links & Wrap-Up

- Download this Webinar on-demand:
  - www.tcdi.com
  - www.7thcircuitbar.org
- Technology Tidbits: 5-20 minute podcasts on particular areas of technology coming soon – www.tcdi.com
  - Back-ups vs. Archiving
  - Information Management
- All attendees will be emailed a link to the Course Evaluation
- After submitting this form, attendees practicing in the State of Illinois will have the ability to download a Certificate of Attendance

3. April 6, 2011 and May 17, 2011
"What Everyone Should Know About the Mechanics of E-Discovery"

E-DISCOVERY PRACTICAL GUIDE

What Everyone Should Know About the Mechanics of eDiscovery



April 6, 2011

MERRILL CORPORATION

CHIEF JUDGE JAMES F. HOLDERMAN

Chief Judge James F. Holderman has been a United States district judge in Chicago since 1985 and was named chief judge of the U.S. District Court for the Northern District of Illinois in July 2006.

During his tenure on the bench, Judge Holderman has presided over numerous cases in all areas of federal jurisdiction, including intellectual property cases. He has also served by designation as a judge of the United States Court of Appeals for the Seventh Circuit.

Before his appointment to the United States District Court, Judge Holderman was a partner in the law firm of Sonnenschein Nath & Rosenthal where he specialized in federal court litigation across the United States. Before his years in private practice, he was an assistant United States attorney in Chicago.

PROTOCOL

Please submit any questions you have for our Panel through the "question and answer" screen during the Webinar.

If we do not answer your question during today's session we will post those responses after the event and provide the link to view those answers to all attendees via e-mail.

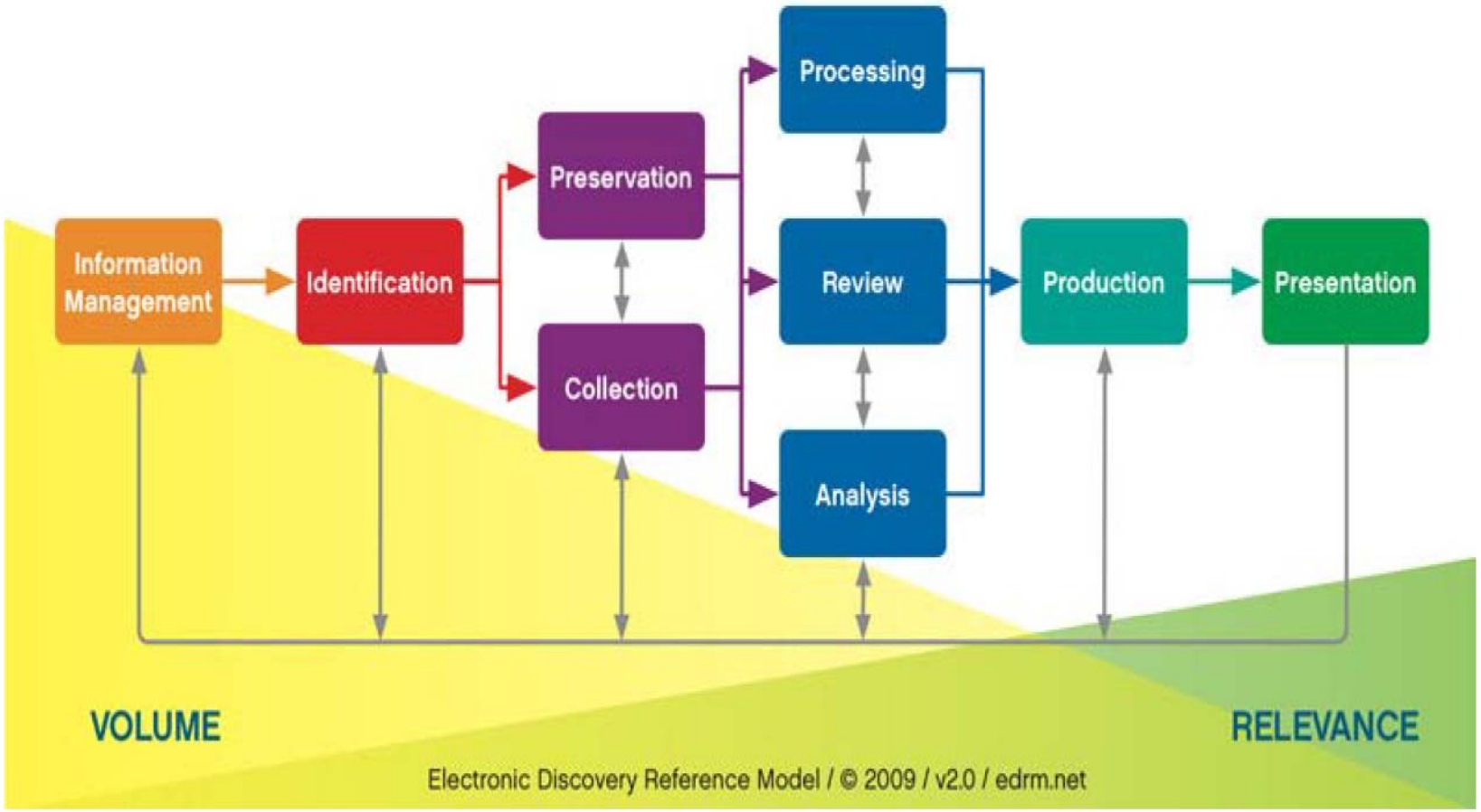
EDUCATION OBLIGATION

Principal 3.02

Judges, attorneys and parties to litigation should also consult The Sedona Conference® publications relating to electronic discovery, additional materials available on web sites of the courts, and of other organizations providing educational information regarding the discovery of ESI.

E-DISCOVERY PROCESS

Electronic Discovery Reference Model



OVERRIDING INTENT

Principal 1.01 (Purpose)

The purpose of these Principles is to assist courts in the administration of Federal Rule of Civil Procedure 1, to secure the just, speedy, and inexpensive determination of every civil case, and to promote, whenever possible, the early resolution of disputes regarding the discovery of electronically stored information ("ESI") without Court intervention. Understanding of the feasibility, reasonableness, costs, and benefits of various aspects of electronic discovery will inevitably evolve as judges, attorneys and parties to litigation gain more experience with ESI and as technology advances.

WHAT IS ELECTRONIC DISCOVERY?

The collection, preparation, review and production of ESI which is relevant to a legal or government proceeding.

ESI can include:

- E-mail and attachments
- Text files, such as Word®, Excel®, PowerPoint®, Access®
- Data stored on BlackBerry® smartphones and PDAs
- Data on archival and backup tapes
- Proprietary applications and databases
- Internet cache files, cookies, favorites
- Instant and text messages
- Voicemail
- Audiotape and videotape
- Evolving technology and media
- Data stored on home computers and home e-mail

WHAT IS ELECTRONIC DISCOVERY?

Electronic discovery is the collection, preparation, review and production of ESI which is relevant to a legal or government proceeding.

Hardware can include:

- Desktop Computers/Hard Drives/Laptops
- Backup Tapes
- Portable Flash Drives, Floppy, Zip and Jaz Diskettes
- Optical Media - CDs, CD-Roms, DVDs
- Home Computers
- PDAs, Blackberry® smartphones and Cell Phones
- Digital Cameras and Flash Media
- Voicemail
- Fax Machines, Copiers and Printers
- iPod® and iPad® mobile digital devices, Kindle™ and Nook ™ eReaders, etc.

WHAT IS ELECTRONIC DISCOVERY?

Electronic discovery is the collection, preparation, review and production of ESI which is relevant to a legal or government proceeding.

Additional "Novel" Hardware:

- **Life/Safety Systems**
- **Manufacturing Monitoring Systems**
- **Vehicle "Black Box" Devices**
- **Emergency Dispatch System Record**

THE ELECTRONIC LANDSCAPE

Storage Amounts or Quantities

CD = 650 MB (325,000 pages of text)

DVD = 8.5 GB (4,250,000 pages of text)

Blu-Ray Disc = 25-50 GB (up to 25 million pages of text)

DLT Tape = 160 GB (80 million pages of text)

Super DLT Tape = 320 GB (1.6 billion pages of text)

MB = 500 pages of text

GB = 500,000 pages of text

THE ELECTRONIC LANDSCAPE

Translating Data Units of Measure

Name	Number of Bytes	Amount of Text
Kilobyte (KB)	2^{10} or 1,024	1/2 page
Megabyte (MB)	2^{20} or 1,048,576	500 pages or 1 thick book
Gigabyte (GB)	2^{30} or 1,073,741,824	500,000 pages or 1,000 thick books
Terabyte (TB)	2^{40} or 1,099,511,627,776	1,000,000 thick books
Petabyte	2^{50} or 1,125,899,906,842,624	180 Libraries of Congress
Exabyte	2^{60} or 1,152,921,504,606,846,976	180 thousand Libraries of Congress

E-DISCOVERY REALITY

Principal 3.01

Because discovery of ESI is being sought more frequently in civil litigation and the production and review of ESI can involve greater expense than discovery of paper documents, it is in the interest of justice that all judges, counsel and parties to litigation become familiar with the fundamentals of discovery of ESI. It is expected by the judges adopting these Principles that all counsel will have done the following in connection with each litigation matter in which they file an appearance:

(1) Familiarize themselves with the electronic discovery provisions of Federal Rules of Civil Procedure, including Rules 26, 33, 34, 37, and 45, as well as any applicable State Rules of Procedure;

(2) Familiarize themselves with the Advisory Committee Report on the 2006 Amendments to the Federal Rules of Civil Procedure, available at: http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf; and

(3) Familiarize themselves with these Principles.

IDENTIFICATION OF ESI

Data Mapping

- **Network Architecture - Map a baseline understanding of the physical structures and layout of corporation data centers**

- **Perform complete Media Inventory:**
  - **Identify all legacy systems;**
  - **Identify all "rogue" systems**
  - **Identify all data destruction policies**
  - **Identify actual implementation realities of destruction policies**

- **Generate complete Data Mapping Report**

IDENTIFICATION OF ESI

Principle 2.05 (Identification of Electronically Stored Information)

(a) At the Rule 26(f) conference or as soon thereafter as possible, counsel or the parties shall discuss potential methodologies for identifying ESI for production.

(b) Topics for discussion may include, but are not limited to, any plans to:

(1) eliminate duplicative ESI and whether such elimination will occur only within each particular custodian's data set or whether it will occur across all custodians;

(2) filter data based on file type, date ranges, sender, receiver, custodian, search terms, or other similar parameters; and

(3) use keyword searching, mathematical or thesaurus-based topic or concept clustering, or other advanced culling technologies.

IDENTIFICATION OF ESI

Legacy Data or Systems

Data stored on old or outdated computer system or media usually after more modern technology has been installed. Retained because a company has invested considerable time and money in data or systems and they may still hold value.

- **A DBMS (database management system) running on mainframes or minicomputers (versus new technology solutions, which continue to move toward PC-based systems).**
- **An entrenched data management platform that contains proprietary, custom-designed software and systems.**

E-MAIL AS ESI

50% to 100% of the Evidence Being Presented in Civil Court is E-mail in its Origin

- E-mail may prove that a business-related event or activity did, or did not, occur. E-mail may demonstrate purchase or sale, pricing, quantity, delivery of goods/services, and customer/client.
- E-mail may identify participants in a business activity or who had knowledge of an event. All address lines (To, From, Cc, and Bcc) may be equally important.
- E-mail may have legal or compliance value.
- E-mail may support facts that you claim to be true, because the person who has direct knowledge of the facts is not available to testify.
- E-mail may address a public official's activities, an investment broker's client communications, or another topic specifically covered by law or regulation.

UNDERSTANDING E-MAIL

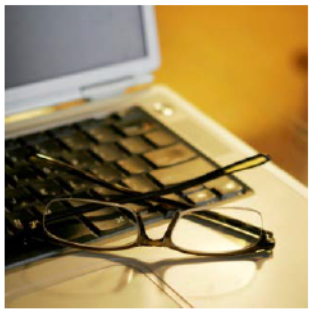
.OST and .PST Files

.OST Files

- When working on Outlook with Exchange Server in Offline Mode. Creates an .OST file stored on local computer (laptop). Creates essentially a Cache file that holds data in place on the C drive until the system is synched with the network.

.PST Files

- Generally an e-mail archive file. May be saved to the C: drive of the creator's computer.
  - No copy of .PST file is on Exchange Server
  - .PST file may be located on either user's computer or on network file share



TEXTING AS ESI

The New E-Mail?

- 292.8 MILLION US subscribers (1)
- 72% of U.S. adult cell phone users text (2)
- 173.2 BILLION text messages sent each month (1)
- 2400% - increase in number of text messages sent from June 2005 to June 2010 (1)
- 593 – average number of text messages per cell phone/month.

(1) Wireless Quick Facts from CTIA – The Wireless Association

(2) Pew Research Center, "The Rise of Apps Culture", September 15, 2010

TEXTING AS ESI

Recovery Options

Mobile Carrier

- Retains content on their server for no more than 3 days generally.

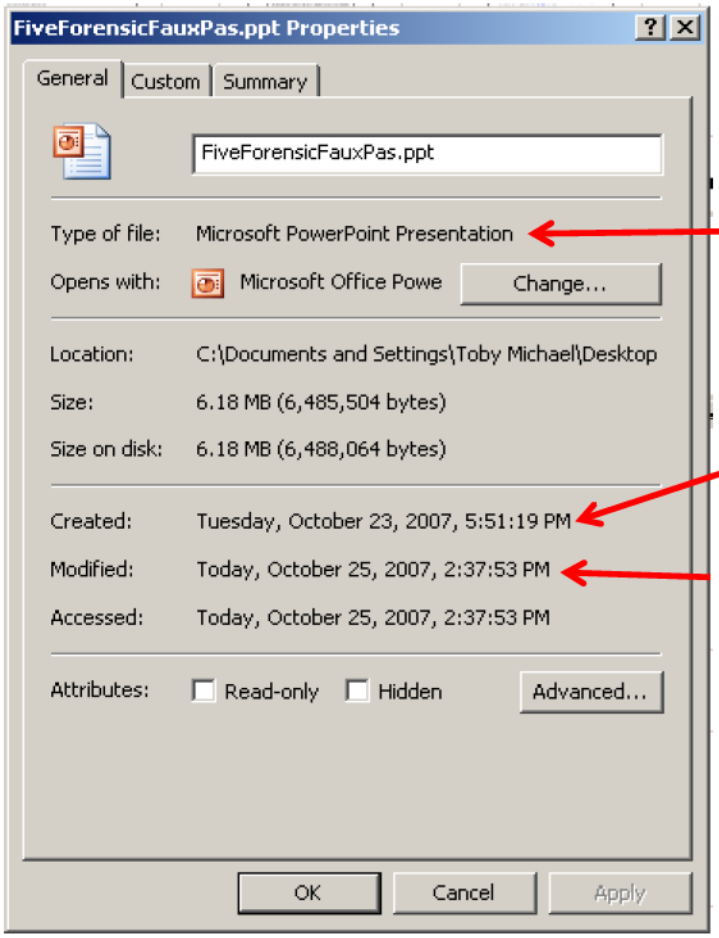
Mobile Device

- Retains content locally up to the device capacity and then content is overwritten and lost.

Retention Expectation

- Typically, information about text messages – such as the sender, recipient and location of sender – is stored for billing purposes. The software used to store that information can also store content of those transmissions. (Kobe Bryant Case)

METADATA AS ESI



Type of Data…

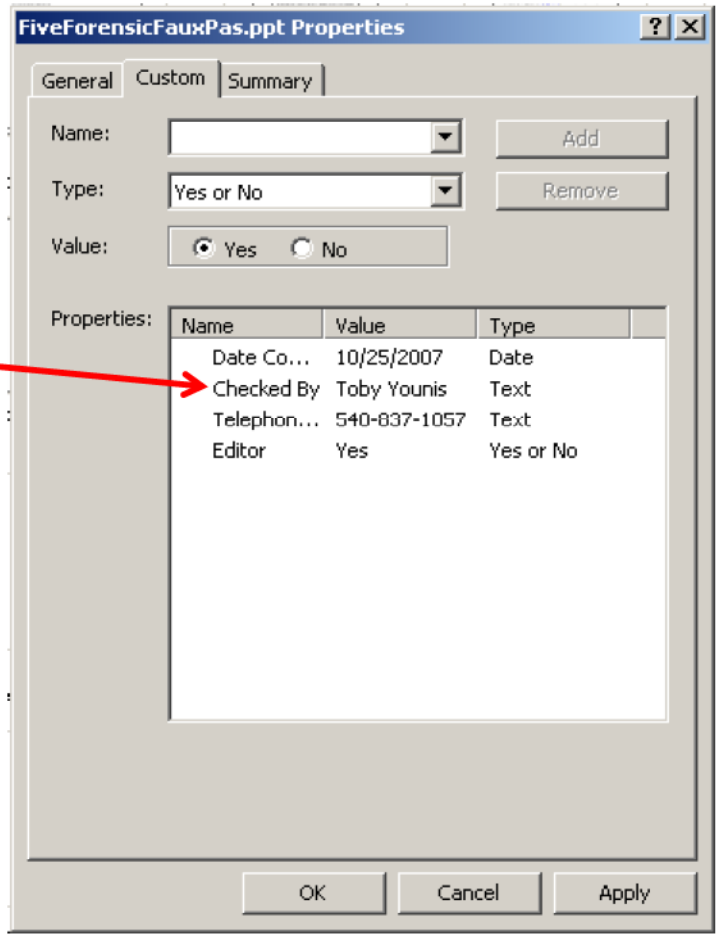
Created by…

When…

Edited…

MAC Data

- **Modified**
- **Accessed**
- **Created**



METADATA AS ESI

Types of Metadata

Application Metadata

Metadata which is embedded with the file it describes and moves with the file when you copy it. The metadata is information which is not present on the printed page and is of particular concern because of it may contain sensitive information such as deleted text as well as the identification of who else has viewed the document.

System Metadata

Which is not embedded with the file it describes but is stored externally and used by the computer's file system to track file locations and store demographics about each file's name, size, location, creation, modification, access and usage.

METADATA AS ESI

Impact of Flawed Preservation

- Lost or permanently altered data
- E-mail threading may be impacted
- Impact on search functionality
- Damage to the Chain of Custody

BACKUP DATA AS ESI

Backup data is an exact copy of system data that serves as a source for recovery in the event of a system problem or disaster. Backup data is generally stored separately from active data on portable media, for example, magnetic backup tapes.

Reasons for a Backup System

- Disaster Recovery
- Hardware protection/restore if disk or server fails

Types of Backup

- Tape drives
- Vault Systems
- Cloud-based

PRESERVATION OF ESI

General Duty of Party to Preserve and Disclose

"The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation."

***Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003)**

PRESERVATION OF ESI

Once the preservation obligation has been triggered, failure to do any of the following will support a finding of gross negligence

- **To issue a written litigation hold;**
- **To identify all of the key players and to ensure that their electronic and paper records are preserved;**
- **To cease the deletion of email or to preserve the records of former employees that are in a party's possession, custody, or control; and**
- **To preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources."**

Pension Committee v. Banc of America Securities LLC, et al, __ F.R.D. __, 2010 WL 184312, *7 (S.D.N.Y. 1/15/10, J. Scheindlin)

PRESERVATION OF ESI

Duty to Preserve

In Response to the Pension Committee Case, the court stated that:

"depending upon the circumstances of an individual case, the failure to abide by such standards does not necessarily constitute negligence, and certainly does not warrant sanctions if no relevant information is lost. For instance, in a small enterprise, issuing a written litigation hold may not only be unnecessary, but it could be counterproductive, since such a hold would likely be more general and less tailored to individual records custodians than oral directives could be. Indeed, under some circumstances, a formal litigation hold may not be necessary at all."

The court further held that failure to adopt good preservation practices is just one factor to be considered when considering sanctions for spoliation and should only be applied when "discovery relevant" data has been destroyed.

Orbit One Communications, Inc. v. Numerex Corp., et. al., **271 F.R.D. 429, 441 (S.D.N.Y. 2010)**

PRESERVATION OF ESI

Types of Litigation Holds

Internal

- Issued to internal actors to prevent destruction of evidence

Opposing Party

- Issued proactively to opposing party to put party on notice of duty to preserve

Third Party to the Action

- Informs non-party of preservation need and also informs court about need to issue a preservation order

PRESERVATION OBLIGATION

Principle 2.03 (Preservation Requests and Orders)

(a) Appropriate preservation requests and preservation orders further the goals of these Principles. Vague and overly broad preservation requests do not further the goals of these Principles and are therefore disfavored. Vague and overly broad preservation orders should not be sought or entered. The information sought to be preserved through the use of a preservation letter request or order should be reasonable in scope and mindful of the factors set forth in Rule 26(b)(2)(C).

RECIPIENTS OF THE LITIGATION HOLD

Foundational Requirement

- General (Inside) Counsel and Corporate Leadership
- Key Players
- IT, HR and those responsible for implementation of the Litigation Hold
- All others identified during the investigation as having relevant information regarding the facts and circumstances giving rise to the case/investigation

Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212, 217-218 (S.D.N.Y. 2003)

COMMUNICATION OF THE HOLD

Foundational Requirement

- Certified and regular mail
- Hand delivery
- Facsimile
- As part of an email or email attachment

COMMUNICATION OF THE HOLD

An Issue of Privilege?

- **Generally, Litigation Hold Notice Letters are privileged and not subject to discovery.**

  ***In re eBay Seller Antitrust Litigation,* 2007 WL 2852364 (N.D. Cal., Oct. 2, 2007).**

- **What is not privileged is what company employees are doing to preserve and collect relevant ESI.**

- **The opposing party is entitled to know "what kinds and categories of ESI eBay employees were instructed to collect, and what specific actions they were instructed to undertake to that end."**

  Id. at *2; see also *Gibson v. Ford Motor Co.*, 2007 WL 41954 (N.D. Ga., Jan. 4 2007)

PRESERVATION OBLIGATION

Principle 2.03 (Preservation Requests and Orders)

(b) To the extent counsel or a party requests preservation of ESI through the use of a preservation letter, such requests should attempt to ensure the preservation of relevant and discoverable information and to facilitate cooperation between requesting and receiving counsel and Seventh Circuit Electronic Discovery Pilot Program – Report on Phase One 6 parties by transmitting specific and useful information. Examples of such specific and useful information include, but are not limited to:

(1) names of the parties;

(2) factual background of the potential legal claim(s) and identification of potential cause(s) of action;

(3) names of potential witnesses and other people reasonably anticipated to have relevant evidence;

(4) relevant time period; and

(5) other information that may assist the responding party in assessing what information to preserve.

PRESERVATION OBLIGATION

Principle 2.03 (Preservation Requests and Orders)

(c) If the recipient of a preservation request chooses to respond, that response should provide the requesting counsel or party with useful information regarding the preservation efforts undertaken by the responding party. Examples of such useful and specific information include, but are not limited to, information that:

(1) identifies what information the responding party is willing to preserve and the steps being taken in response to the preservation letter;

(2) identifies any disagreement(s) with the request to preserve; and

(3) identifies any further preservation issues that were not raised.

(d) Nothing in these Principles shall be construed as requiring the sending of a preservation request or requiring the sending of a response to such a request.

KEY ELEMENTS OF A LITIGATION HOLD

Best Practices

- Use plain English and identify what it is: A Litigation Hold
- Explain why the hold has been issued to that person and context for the hold
- Explain the obligation to immediately preserve all copies of any evidence relating to the case/investigation
- List what should be retained: Any and all hardcopy and electronic documents and information relating to…and what this includes, such as letters, emails, faxes, instant messages, text messages, notes, memoranda, spreadsheets, meeting agendas and minutes, summaries, calendar entries and voicemails

KEY ELEMENTS OF A LITIGATION HOLD

Best Practices

- Identify where this information may be found (computers, networks, databases, PDAs, servers, etc.) including any legacy or archive systems

- Clearly demand that all routines for filing, modifying, deleting or recycling any and all such documents MUST BE SUSPENDED and that the person MUST take steps necessary to preserve responsive documents and information, including giving appropriate instructions to their direct reports or employees

- Provide Counsel's contact information for questions or concerns

JUDICIAL REVIEW OF A LEGAL HOLD

Applicable Legal Standard

- **Judicial evaluation of a legal hold decision should be based on the good faith and reasonableness of the decision, including whether the legal hold is necessary and how the legal hold should have been executed, at the time it was made.**

- **Along with the client, counsel should document the decision-making process and the decision itself as to the scope and issuance of the Litigation Hold.**

- **The reason for the documentation is that if facts not known at the time of the decision are later revealed, the decision may be deemed reasonable and justifiable at the time it was made.**

Sedona Conference Commentary on Legal Holds: The Trigger and The Process **(August 2007 Public Comment Version) Guideline 5**

PRESERVATION OF ESI

Refusal to Produce Document Retention Plan

Spoliation claim resulted from Defendant concealing their DRP from Plaintiff during discovery.

Court stated:

"[T]his Court does not understand why defendant did not produce this broader document retention policy when the Court ordered it to reveal its record retention policies… It is inexplicable that defendant could not produce the DRP. This failure is another example of the defendant's negligence in handling preservation and production of electronic documents in this litigation."

***Jones v. Bremen High School Dist. 228*, 2010 WL 2106640, *9 (N.D. Ill., 2010)**

PRESERVATION OF ESI

Passive Spoliation

Court concluded that the defendant's attempts to preserve evidence were reckless and grossly negligent.

- **Plaintiff also was able to prove that the defendant did not take reasonable steps to prevent employees from destroying documents concerning the case, had failed to adequately supervise their employees' efforts at preservation of evidence and that these failures resulted in spoliation and loss of relevant e-mails.**

- **This conduct, along with tardy production of significant amounts of ESI, resulted in prejudice.**

***Jones v. Bremen High School Dist. 228*, 2010 WL 2106640, *9 (N.D. Ill., 2010)**

PRESERVATION OF ESI

Boundaries and Duties of Enforcement

"Identifying the boundaries of the duty to preserve involves two related inquiries:" *when* does the duty to preserve attach, and *what* evidence must be preserved?" *Zubulake v. UBS Warburg, LLC,* 220 F.R.D. 212, 216 (S.D.N.Y.2003) (" *Zubulake IV*)

There are also two additional questions pertinent to satisfying preservation requirements: *how* must a party go about fulfilling its ultimate obligation, and *who* is responsible for seeing that it is fulfilled…

Until a more precise definition is created by rule, a party is well-advised to "retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches. *Zubulake IV,* 220 F.R.D. at 218.

Orbit One Communications, Inc. v. Numerex Corp., et. al., 271 F.R.D. 429, 436-437 (S.D.N.Y. 2010)

PRESERVATION OF ESI

Deliberate Spoliation

Defendant downloaded 6GB of music onto their hard drive the night before it was to be examined by opposition. Court found this "troubling" and did not believe the plaintiff's explanation.

Court stated:

"[D]iscovery is a meaningful part of our adversarial system, and were parties to circumvent discovery requests by selectively destroying potentially damaging information, the process would become ineffectual."

Result: Adverse Inference Instruction upheld.

***Minnesota Mining & Mfg. v. Pribyl*, 259 F.3d 587, 606 (7th Cir. 2001)**

PRESERVATION OF ESI

Destruction Of Computer

- Defendant claimed that communications on a computer were irretrievably lost as it had "crashed" and claimed that he had been instructed that "the mother board and hard drive were shot, and that the computer was not worth fixing."

- 6 days after the lawsuit commenced, two days after initial appearance, Defendant threw away the computer at a construction site 20 miles from his home.

Result: Defendant sanctioned and required to pay plaintiff's costs and attorney's fees in connection with motion for sanctions; third-party discovery that was made necessary by the destruction of the computer; and cost of retaining a computer expert.

***APC Filtration Inc. v. Becker*, 2007 WL 3046233 (D. Ill., October 12, 2007)**

PRESERVATION OF ESI

Passive and Active Spoliation

Court entered sanctions against the defendant arising from the reckless, if not intentional spoliation of evidence involving:

(1) The alleged erasure or replacement of an audiotape…

(2) The destruction/failure to preserve relevant ESI on police department computers;

(3) The failure to preserve ESI on six computer hard drives produced for the first time in the fall of 2008 and;

(4) The failure to back-up any relevant ESI.

Plunk v. Village of Elwood, Ill., **2009 WL 1444436 (N.D. Ill., 2009)**

INACCESSIBLE ESI

Principle 2.04 (Scope of Preservation)

(d) The following categories of ESI generally are not discoverable in most cases, and if any party intends to request the preservation or production of these categories, then that intention should be discussed at the meet and confer or as soon thereafter as practicable:

(1) "deleted," "slack," "fragmented," or "unallocated" data on hard drives;

(2) random access memory (RAM) or other ephemeral data;

(3) on-line access data such as temporary internet files, history, cache, cookies, etc.;

(4) data in metadata fields that are frequently updated automatically, such as last-opened dates;

(5) backup data that is substantially duplicative of data that is more accessible elsewhere; and

(6) other forms of ESI whose preservation requires extraordinary affirmative measures that are not utilized in the ordinary course of business.

WHERE COURTS ARE HEADED

7th Circuit Electronic Discovery Pilot Program

Principle 2.02 (eDiscovery Liaison(s))

In most cases, the meet and confer process will be aided by participation of an eDiscovery liaison(s) as defined in this Principle. In the event of a dispute concerning the preservation or production of ESI, each party shall designate an individual(s) to act as eDiscovery liaison(s) for purposes of meeting, conferring, and attending court hearings on the subject. Regardless of whether the eDiscovery liaison(s) is an attorney (in-house or outside counsel), a third party consultant, or an employee of the party, the eDiscovery liaison(s) must:

(a) be prepared to participate in eDiscovery dispute resolution;

(b) be knowledgeable about the party's eDiscovery efforts;

(c) be, or have reasonable access to those who are, familiar with the party's electronic systems and capabilities in order to explain those systems and answer relevant questions; and

(d) be, or have reasonable access to those who are, knowledgeable about the technical aspects of e-discovery, including electronic document storage, organization, and format issues, and relevant information retrieval technology, including search methodology.

PREPARATION FOR THE MEET AND CONFER

eDiscovery Liaison and 30(b)(6) Witnesses

- May require more than one witness be identified by system, by demand, by location, by division, by specific area of focus.
- Do not trust that the witness produced by your client is qualified. Do independent review of the witness' qualifications and knowledge base.
- eDiscovery Liaison (7th Circuit Pilot Program) is not necessarily the 30(b)(6) witness. Liaison only has to have access to those with the knowledge – not necessarily hold the knowledge.

PREPARATION FOR THE MEET AND CONFER

What Courts Want To See – Cooperation!

Cooperative Discovery is Required by the Rules of Civil Procedure

- When the first uniform civil procedure rules allowing discovery were adopted in the late 1930s, "discovery" was understood as an essentially cooperative, rule-based, party-driven process, designed to exchange relevant information. The goal was to avoid gamesmanship and surprise at trial.

- Over time, discovery has evolved into a complicated, lengthy procedure requiring tremendous expenditures of client funds, along with legal and judicial resources. These costs often overshadow efforts to resolve the matter itself.

- The 2006 amendments to the Federal Rules specifically focused on discovery of "electronically stored information" and emphasized early communication and cooperation in an effort to streamline information exchange, and avoid costly unproductive disputes.

PREPARATION FOR THE MEET AND CONFER

Sedona Conference Cooperation Proclamation

Courts see these rules as a mandate for counsel to act cooperatively and encourage:

- **Utilizing internal ESI discovery "point persons" to assist counsel in preparing requests and responses;**
- **Exchanging information on relevant data sources, including those not being searched, or scheduling early disclosures on the topic of ESI;**
- **Jointly developing automated search and retrieval methodologies to cull relevant information;**
- **Promoting early identification of form, or forms, of production;**
- **Developing case-long discovery budgets based on proportionality principles; and**
- **Considering court-appointed experts, volunteer mediators, or formal ADR programs to resolve discovery disputes.**

http://www.thesedonaconference.org/content/tsc_cooperation_proclamation/proclamation.pdf

PREPARATION FOR THE MEET AND CONFER

What Courts Want To See – Cooperation!

"The Court is most troubled by the fact that there was no dialogue to discuss specific search terms or data custodians to be searched in advance of Huron conducting its searches. Although Defendants' counsel and Huron's counsel spent a significant amount of time exchanging letters and emails with each other relating to the motion to compel, they did not engage in meaningful discussions with each other." *DeGeer v. Gillis*, 2010 WL 5096563, *20 (N.D. Ill., 2010)

"Counsel are on notice that going forward the Court expects them to genuinely confer in good faith and make reasonable efforts to work together and compromise on discovery issues whenever possible." *Ibid* at *21

COOPERATION

Principle 1.02 (Cooperation)

An attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

PREPARATION FOR THE MEET AND CONFER

Cost Shifting

General Philosophy

"the presumption is that the responding party must bear the expense of complying with discovery requests … In the subpoena context, cost-shifting should occur when an order requiring compliance subjects a non-party to "significant expense."

***DeGeer v. Gillis*, 2010 WL 5096563, *19 (N.D.Ill., 2010)**

PREPARATION FOR THE MEET AND CONFER

Cost Shifting

Parties to Litigation

In *Quinby,* the court refused to shift discovery costs in favor of the party that had allowed the downgrading, reasoning that "if a party creates its own burden or expense by converting into an inaccessible format data that it should have reasonably foreseen would be discoverable material at a time when it should have anticipated litigation, then it should not be entitled to shift the costs of restoring and searching the data." *Orbit One Communications, Inc. v. Numerex Corp., et. al.,* 271 F.R.D. 429, 437 (S.D.N.Y. 2010) citing to *Quinby v. WESTLB AG*, 245 F.R.D. 94, 104 (S.D.N.Y., Sept. 5, 2006).

Third Parties to Litigation

In addition, The Sedona Commentary notes that the few reported cases that have addressed the acquisition of ESI from non-parties "recognize that the costs and burdens of preservation and production that the law imposes on litigants should not be the same for non-parties. Third parties should not be required to subsidize litigation to which they have no stake in the outcome." *DeGeer v. Gillis*, 2010 WL 5096563, *8 (N.D. Ill., 2010*) see also* The Sedona Conference Commentary on Non-Party Production & Rule 45 Subpoenas, 9 SEDCJ 197-199 (2008).

MEET AND CONFER

Principle 2.04 (Scope of Preservation)

(c) The parties and counsel should come to the meet and confer conference prepared to discuss the claims and defenses in the case including specific issues, time frame, potential damages, and targeted discovery that each anticipates requesting. In addition, the parties and counsel should be prepared to discuss reasonably foreseeable preservation issues that relate directly to the information that the other party is seeking. The parties and counsel need not raise every conceivable issue that may arise concerning its preservation efforts; however, the identification of any such preservation issues should be specific.

MEET AND CONFER

Preservation Scenarios

Snapshot – point in time copy of relevant data. Back-up tapes preserve a snap-shot of all the data on a server or computer system at a specific point-in-time. May involve preserving the status of an information system as it continues to evolve.

Historical – Recovery and preservation of ESI involves an event in the past and collection can be achieved in one phase.

Ongoing – collection is initiated and requires additional collection of data as it is created.

MEET AND CONFER

Make or Arrange for Initial Disclosures

FRCP 26(a)(1)(A) requires disclosure of the following:

- **The name, addresses and telephone numbers of each individual likely to have discoverable information – along with the subjects of that information**
- **A copy – or description by category and location – of all documents, ESI, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment**
- **A computation of each category of damages claimed by the disclosing party - who must also make available for inspection and copying - the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based and the underlying materials supporting the computation.**

MEET AND CONFER

Principle 2.01 (Duty to Meet and Confer on Discovery and to Identify Disputes for Early Resolution)

(a) Prior to the initial status conference with the Court, counsel shall meet and discuss the application of the discovery process set forth in the Federal Rules of Civil Procedure and these Principles to their specific case. Among the issues to be considered for discussion are:

(1) the identification of relevant and discoverable ESI;

(2) the scope of discoverable ESI to be preserved by the parties;

(3) the formats for preservation and production of ESI;

(4) the potential for conducting discovery in phases or stages as a method for reducing costs and burden; and

(5) the procedures for handling inadvertent production of privileged information and other privilege waiver issues under Rule 502 of the Federal Rules of Evidence.

MEET AND CONFER

Principle 2.01 (Duty to Meet and Confer on Discovery and to Identify Disputes for Early Resolution)

(b) Disputes regarding ESI that counsel for the parties are unable to resolve shall be presented to the Court at the initial status conference, Fed. R. Civ. P. Rule 16(b) Scheduling Conference, or as soon as possible thereafter.

(c) Disputes regarding ESI will be resolved more efficiently if, before meeting with opposing counsel, the attorneys for each party review and understand how their client's data is stored and retrieved in order to determine what issues must be addressed during the meet and confer discussions.

(d) If the Court determines that any counsel or party in a case has failed to cooperate and participate in good faith in the meet and confer process or is impeding the purpose of these Principles, the Court may require additional discussions prior to the commencement of discovery, and may impose sanctions, if appropriate.

MEET AND CONFER

Principle 2.04 (Scope of Preservation)

(e) If there is a dispute concerning the scope of a party's preservation efforts, the parties or their counsel must meet and confer and fully explain their reasons for believing that additional efforts are, or are not, reasonable and proportionate, pursuant to Rule 26(b)(2)(C). If the parties are unable to resolve a preservation issue, then the issue should be raised promptly with the Court.

Identification

MEET AND CONFER

Discovery Plan

Pursuant to FRCP 26(f)(3), a Discovery Plan must state the parties' views and proposals on:

- **What changes should be made in the timing form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;**
- **The subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;**
- **Any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced";**
- **Any issues about claims of privilege or of protection as trial-preparation materials, including – if the parties agree on a procedure to assert these claims after production – whether to ask the court to include their agreement in an order;**
- **What changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and**
- **Any other orders that the court should issue under Rule 26(c) or under Rule 16(b).**

MEET AND CONFER

Failure to Effectively Meet and Confer

- Urged parties to estimate the likely range of provable damages that foreseeably could be awarded if Plaintiffs prevail at trial. Goal is to quantify a workable "discovery budget" that is proportional to what is at issue in the case.
- Counsel should discuss the amount and type of discovery already provided, and then discuss the additional discovery still sought, in order to evaluate the Rule 26(b)(2)(C) factors, and to determine if legitimate additional discovery needs could be fulfilled from non-duplicative, more convenient, less burdensome, or less expensive sources than those currently sought.
- Counsel should reach agreement, in full or at least in part, about what additional discovery (and from what sources), should be provided. Suggestion is to consider "phased discovery", so that the most promising, but least burdensome or expensive sources of information could be produced initially, which would enable parties to reevaluate their needs depending on the information already provided.

Mancia v. Mayflower, 253 F.R.D. 354 (D. Md. 2008)

PROPORTIONALITY

Principle 1.03 (Discovery Proportionality)

The proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C) should be applied in each case when formulating a discovery plan.

To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable.

MEET AND CONFER

Suggested Discussion Points

- Who determines the keywords?
- How many keyword searches (30-50)?
- Search what data sources?
- Type of data to be searched such as Word® docs, e-mails, etc.
- Last names, nicknames, first names, surnames of key persons.
- Key event terms
- Key phrases
- Thesaurus important terms
- Consider misspellings
- Test run search strings

COLLECTION

Data Collection Plan

- Design an approach to locate responsive ESI
- Locate custodians and computer systems
- Determine file types and media
- Collect data in a way that ensures preservation of the original metadata and avoids spoliation
- Document method of collection to satisfy any authentication of evidence needs (Chain of Custody)

PLAN FIRST!

COLLECTION

FORENSIC COPY

Exact copy of everything on the hard drive including slack space, latent data, metadata and unallocated space. Creates a mirror image/clone without alteration.

TARGETED ACQUISITION

Process employed to copy just the relevant files or folders by going to each drive/server/ media or through the use of ECA tools and technology. Metadata for the documents is copied but slack space, unallocated space, latent data and system metadata are not copied.

The hash value on the source drive must still match the hash value on the evidentiary/forensic copy or on the working copy.

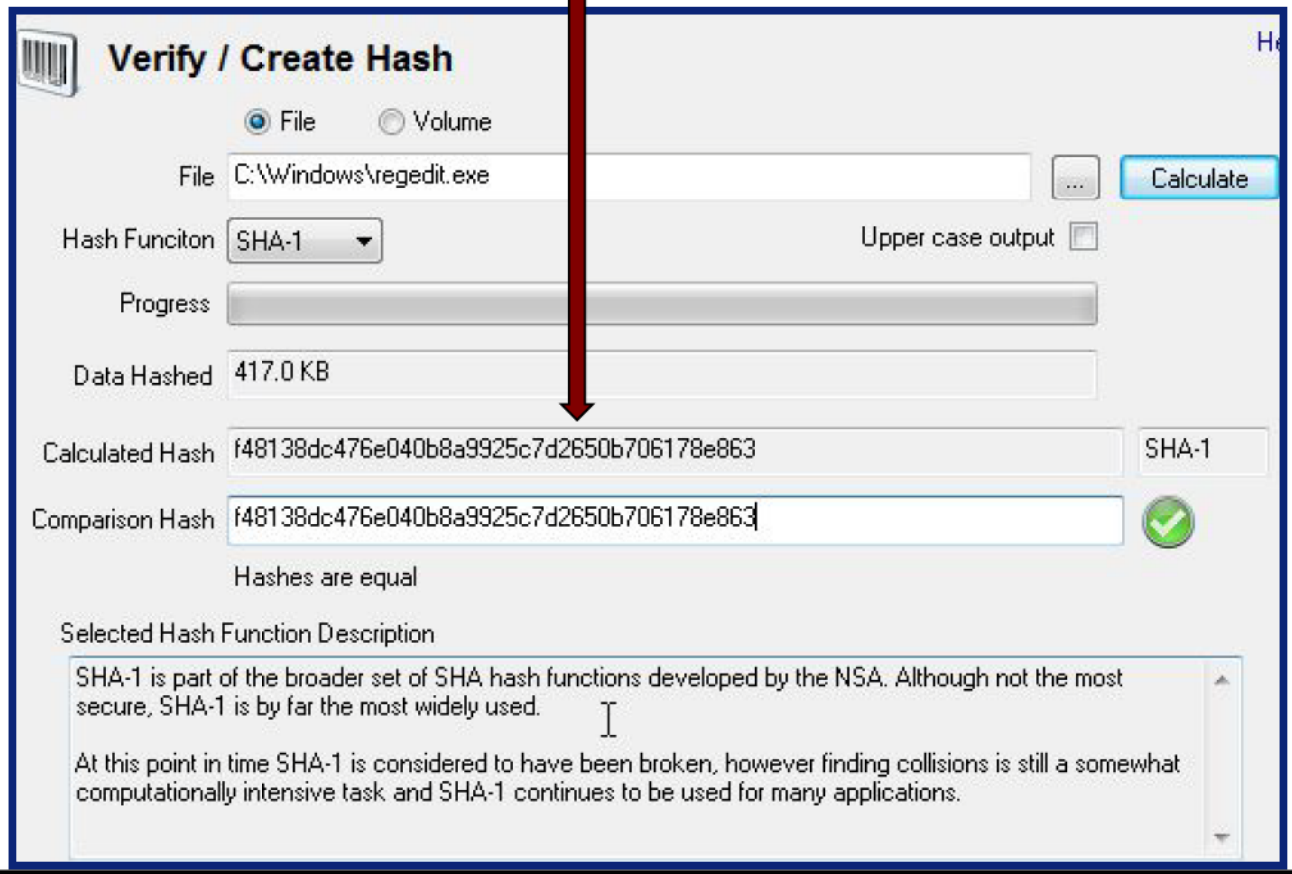
COLLECTION

What is a Hash Value?

A hash value is an electronic fingerprint.

"A hash value can be applied to a file, a section of a disk, or a whole disk, and recorded. The hash value will change if the data in a file, section or disk is changed or altered."

Hash Value



COLLECTION

Hash Values

Common Hash Functions are MD5 and SHA. These commonly used cryptographic hash functions have been employed in a wide variety of security applications, and are also commonly used to check the integrity of files.

The integrity of the data can be "checked" at any later time by re-computing the hash and comparing it with the original value. If the hash values do not match, the data was almost certainly altered (either intentionally or unintentionally).

It is critical that the hash value of the original ESI be recorded at the time of acquisition and then matched against the hash value of the copied versions to maintain the standards essential for authentication.

COLLECTION

Basics Of Laying A Foundation For ESI

"One method of authenticating electronic evidence under rule 901(b)(4) is the use of 'hash values' or 'hash marks' when making documents. A hash value is: a unique numerical identifier that can be assigned to a file, a group of files, or a portion of a file, based on a standard mathematical algorithm applied to the characteristics of the data set.

The most commonly used algorithms, known as MD5 and SHA, will generate numerical values so distinctive that the chance that any two data sets will have the same hash value, no matter how similar they appear, is less than one in one billion. 'Hashing' is used to guarantee the authenticity…"

Lorraine v. Markel American Insurance Co, 241 F.R.D. 534, 546 (D.Md. 2007)

SEARCHING ESI

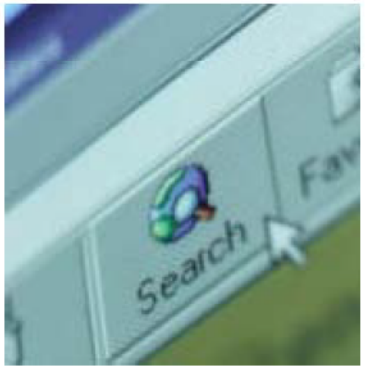
Keyword Search – Is it Enough?

A "series of targeted keyword searches" is often the best means to search for relevant documents in an electronic database. *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003)

Keyword searches are never perfect because language is not perfect. For example, searching for a "car" will not yield a "Mercedes" or a "CLK."

SEARCHING ESI

Search Functionality



- Boolean searches and, or, not)
- Wildcard searches (*auto*, *tion)
- Proximity searches
- Sound-alikes
- Synonym search
- Similar document searching
- Fuzzy searching
- Statistical searching
- Conceptual searching
- Content-based searching
- Topical searching
- Weighted relevance searching
- Adaptive pattern recognition
- Associative retrieval
- Natural language or non-boolean retrieval
- Clusters of related phrases

SEARCHING ESI

- Each review tool is equipped with a variety of search mechanisms. While the actual search label may be the same the actual search functionality may be radically different in each application.
- To further complicate the issue each tool comes equipped with its own methods of reporting the search results.
- Search is a rapidly evolving area and there may be a difference in capabilities between different versions of a vendor's platform.
- The level of support to utilize the tool to maximum effectiveness is variable between vendors.

BREADTH OF THE SEARCH

Plaintiff

- Claimed that Tandem only produced content from 10 out of 34 back-up tapes and refused to produce a set of monthly back-up tapes that contained additional ESI.

Defendant

- Claimed third party vendor declared several tapes "unrestorable", several had "file mark errors" and several did not contain responsive material.

Court Ruled

- "This information is reasonably calculated to lead to the discovery of admissible evidence, this Court believes that restoration of the back-up tapes containing documents is reasonable. Tandem has asserted that in its usual course of business it maintains its documentation in an electronic format. The Court will limit this request to production of the back-up tapes of documents saved to the network system from September 2004 until September 2005."

Puckett v. Tandem Staffing Solutions, Inc., 2007 WL 7122747, *3 (N.D. Ill., 2007)

SHIFTING THE BURDEN OF SEARCH

- **Plaintiff sought four terabytes (500 billion typed pages) of documents, notes, memos, e-mails and metadata existing on two external hard drives.**

- **The court ordered keyword searches of e-mails be split 50/50 but ordered defendants to pay 100% of privilege review costs.**

***Haka v. Lincoln County*, 2007 U.S. Dist Lexis 64480**
(W.D. Wis., Aug. 29, 2007)

FOUNDATION FOR PRIVILEGE

FRCP 26(b)(5) states:

(5) Claiming Privilege or Protecting Trial-Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

CLAWBACK

Federal Rule of Evidence 502:

FRE 502(b) states that a disclosure of privileged information or work-product does not operate as a waiver if:

1. **The disclosure was inadvertent;**
2. **The holder of the privilege or protection took reasonable steps to prevent disclosure;**
3. **The holder promptly took reasonable steps to rectify the error, including (if applicable) following FRCP 26(b)(5)(B).**

CLAWBACK

Reasonability Defined

"The standard of Rule 502(b)(2) is not "all reasonable means," it is "reasonable steps to prevent disclosure."

- **[T]he decision appears to be contrary to the view of the Judicial Conference Rules Committee that Rule 502 "does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake."** Rule 502 comm. explanatory n.(2007); ***see also Heriot,*** 257 F.R.D. at 660

- **The court finds that Whitecap took reasonable steps to prevent disclosure. That Whitecap made a mistake in producing the e-mail despite those steps is not fatal to its claim for protection.** ***Coburn Group, LLC v. Whitecap Advisors LLC,*** 640 F.Supp.2d 1032, *1040 (N.D. Ill.,2009)

FORMAT OF PRODUCTION

Federal Rules: Format of Production

FRCP 34(b) requires that unless the parties agree, or the court orders otherwise:

- **Production of ESI should be as it is "kept in the usual course of business".**
- **If no format is specified then production should be in the form in which the ESI is "ordinarily maintained" or in a form that is "reasonably usable".**
- **A party need not produce ESI in more than one form.**

FORMAT OF PRODUCTION

Principle 2.06 (Production Format)

(a) At the Rule 26(f) conference, counsel and the parties should make a good faith effort to agree on the format(s) for production of ESI (whether native or some other reasonably usable form). If counsel or the parties are unable to resolve a production format issue, then the issue should be raised promptly with the Court.

(b) ESI stored in a database or a database management system often can be produced by querying the database for discoverable information, resulting in a report or a reasonably usable and exportable electronic file for review by the requesting counsel or party.

(c) ESI and other tangible or hard copy documents that are not text-searchable need not be made text-searchable.

(d) Generally, the requesting party is responsible for the incremental cost of creating its copy of requested information. Counsel or the parties are encouraged to discuss cost sharing for optical character recognition (OCR) or other upgrades of paper documents or non-text-searchable electronic images that may be contemplated by each party.

FORMAT OF PRODUCTION

Spreadsheet and Databases

- Database management systems are the largest repositories of ESI. They take many forms such as flat-file or relational. Most businesses use relational databases such as Oracle® or Access®.
- Field properties in a database are considered metadata.
- Principle 2.06(b) ESI stored in a database or a database management system often can be produced by querying the database for discoverable information, resulting in a report or a reasonably usable and exportable electronic file for review by the requesting counsel or party.

FORMAT OF PRODUCTION

Native vs. Image Format

Native

- Native format is proprietary and generally not transferable to other software applications
- Can only be opened, modified and saved within original application unless they are loaded to specialized review software or converted to a searchable format
- Redaction and Bates stamping are complicated
- Carries metadata such as “tracked changes”

Image Format

- ESI has been scanned to create a picture of the document through digitization. The ESI has been converted into “electronic paper” or a “picture”
- Does not provide metadata or allow electronic searching of the data
- May be OCR’d to make it text searchable

FORMAT OF PRODUCTION

Metadata is ESI

- Defendant produced spreadsheets in an image format.
- Court held that a responding party may not simply produce hard copy forms of electronic documents, thereby removing any opportunity to view the metadata.
- Court quoted the Fed. R. Civ. P. 34 Advisory Committee Note on the 2006 Amendments explaining "[i]f the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or degrades this feature."

Scotts Company, LLC. v. Liberty Mutual Insurance Co., 2007 WL 1723509 (S.D. Ohio, June 12, 2007)

FORMAT OF PRODUCTION

Remember to Discuss Metadata

- "It seems a little late to ask for metadata after documents responsive to a request have been produced in both paper and electronic format. Ordinarily, courts will not compel the production of metadata when a party did not make that a part of its request…

- [T]he conference states that "[a]lthough there are exceptions to every rule, especially in an evolving area of the law, there should be a modest legal presumption in most cases that the producing party need not take special efforts to preserve or produce metadata." *Williams v. Sprint/United Management Co.*, 230 F.R.D. 640, 651 (D.Kan., 2005) (quoting The Sedona Principles, Comment 12a)

- There was no request for metadata here until recently-after production. ADC was the master of its production requests; it must be satisfied with what it asked for." *Autotech Technologies Ltd. Partnership v. Automationdirect.com, Inc.,* 248 F.R.D. 556, 559-560 (N.D. Ill., 2008)

FORMAT OF PRODUCTION

Common Terminology

Text Searchable

- **The quality of a document that allows it to be machine searched for targeted text**

OCR (Optical Character Recognition)

- **The processing of an imaged document (such as scanned hard copy) to make it searchable**

Text Extraction

- **Pulling out the text and populating a specified field with that text, thus allowing easy search in a document review platform**

FORMAT OF PRODUCTION

Load File

- A file that accompanies a set of scanned images or electronically processed files, typically providing document information such as selected metadata, coded data, and extracted text, formatted for loading into a document review platform.
- In addition, it indicates where individual pages or files belong together as documents, where to include attachments, and where each document begins and ends.
- Load files are obtained or provided in prearranged formats to ensure transfer of accurate and usable images and data for the receiving document review platform.

ADDITIONAL RESOURCES

Seventh Circuit Court of Appeals:

http://www.ca7.uscourts.gov/

Seventh Circuit Pilot Program Principles:

http://www.7thcircuitbar.org/associations/1507/files/Statement%20-%20Phase%20One.pdf

Seventh Circuit Bar Association:

http://www.7thcircuitbar.org

Sedona Conference and Glossary:

http://www.thesedonaconference.org/

http://www.thesedonaconference.org/dltForm?did=TSCGlossary_12_07.pdf

EDRM:

http://edrm.net/

Merrill Knowledge Source:

http://www.merrillcorp.com/merrill-knowledge-source.htm

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Following this presentation all attendees will receive an e-mail containing a link to the evaluation form for this seminar.

Upon completion of the course evaluation you will receive a download of the preceding presentation content.

The CLE Certificate will be sent to all those participants who attended the full course.

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All Questions, including those questions submitted via the "questions and answers" function during this webcast, and their answers will be available for review by all attendees.

The link to view the questions and answers will accompany the evaluation form for this MCLE event and will be distributed to each attendee.

4. November 30, 2011
"The Ethics of E-Discovery"

Ethics of e-Discovery

Judge Mark J. Dinsmore
Honorable Magistrate Judge of the United States District Court for the Southern District of Indiana

Debra Bernard
Perkins Coie, LLP

Timothy Chorvat
Jenner & Block

Rachel Lei
GATX Corporation

Cinthia Motley
Wilson Elser (moderator)

When we are talking about e-discovery, we are talking about the same familiar discovery concepts:

- Duty to Preserve
- Production
- Cooperation
- Privilege Issues
- Sanctions

Principle 1.02 (Cooperation)

- Failure of counsel to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

Presentation Overview

I. Preservation and Spoliation
II. The Search for and Production of Documents
III. Preservation of Privilege and Confidential Client Information
IV. Duty to Supervise

I. Preservation and Spoliation

ABA Model Rule 3.4: Fairness To Opposing Party And Counsel

a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act

b) (knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists

c) in pretrial procedure, make a frivolous discovery requestor fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party

Federal Rules of Civil Procedure

- FRCP 37 (e):
  - Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.

Seventh Circuit E-Discovery Pilot Program Principles

- Principle 2.03 (Preservation Requests and Orders)
- Principle 2.04 (Scope of Preservation)
  - (a) Every party to litigation and its counsel are responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control.

General Duty

- Preserve possibly relevant information:
  - in connection with a dispute in litigation or,
  - reasonably anticipated to lead to litigation

Specific Duties

- Scope of preservation obligation
- Client document and data retention policies
- Various forms of data

Preservation: Hold Notice

- In writing?
- Timeliness
- Amend hold notice
- Reissuing hold notice

Illustrative Cases

- *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004): counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched
- *Pension Committee v. Banc of America*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010): failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information

Illustrative Cases

- *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598 (S.D. Tex. 2010): "Whether preservation or discovery conduct is acceptable in a case depends on what is reasonable, and that in turn depends on whether what was done–or not done–was proportional to that case and consistent with clearly established applicable standards."
- *Victor Stanley, Inc. v. Creative Pipe, Inc*., 269 F.R.D. 497 (D. Md. 2010): assessment of reasonableness and proportionality should be at the forefront of all inquiries into whether a party has fulfilled its duty to preserve relevant evidence

Illustrative Cases

- *Phillip M. Adams & Assoc., LLC v. Dell, Inc.*, 621 F. Supp. 2d 1173 (D. Utah 2009): The absence of a coherent document retention policy" is a pertinent factor to consider when evaluating sanctions.
- *Jones v. Bremen High School District*, 2010 U.S. Dist. LEXIS 51312 (N.D. Ill. 2010): It is unreasonable to allow a party's interested employees to make the decision about the relevance of documents

Illustrative Cases

- *Passlogix v. 2FA Technology*, 2010 U.S. Dist. LEXIS 43473 (S.D.N.Y. May 4, 2010): spoliation included emails, text-messages, and Skype messages
- *Orbit One Communications v. Numerex*, 271 F.R.D. 429 (S.D.N.Y. 2010): sanctions are not warranted unless there is proof that some information of significance has actually been lost.

Illustrative Cases

- *Green v. Blitz USA*, 2011 U.S. Dist. LEXIS 20353 (E.D. Tex. 2011): court considered parameters of electronic search terms when entering sanctions
- *Micron Tech., Inc. v. Rambus Inc*., 645 F.3d 1311 (Fed. Cir. 2011): "whether a reasonable party in the same factual circumstances would have reasonably foreseen litigation"

Illustrative Cases

- *Alford v. Rents*, 2010 WL 4222922, 2010 U.S. Dist. LEXIS 112000 (S.D.Ill. 2010): Professional misconduct related to discovery led to sanctions in the form of individual fines for counsel
- *Grey v. Kirkland & Ellis*, 2010 WL 3526478, 2010 U.S. Dist. LEXIS 91726 (N.D.Ill. 2010) Court rejected plaintiffs' contention was that counsel was grossly and/or intentionally negligent with their discovery
- *Olson v. Sax* 2010 WL 2639853, 2010 U.S. Dist. LEXIS 76981 (E.D. Wis. 2010) Court denied motion for sanctions for spoliation despite party's failure to preserve data when aware of potential litigation as no evidence of "bad faith" destruction was found.

Sources of Information

- Seventh Circuit E-Discovery Pilot Program Website:
  - www.discoverypilot.com
- Sedona Conference
  - www.sedonaconference.org

Consequences

- Rule 37 sanctions
- Court sanctions
- Substantive regulations
- Civil liability (*e.g. Boyd v. Travelers*, 652 N.E.2d 267 (Ill. 1995))
- Criminal liability
- Malpractice liability
- Bar discipline

When is Duty to Preserve Triggered?

- Litigation reasonably anticipated
- Fact & Document/Data specific
- Plaintiff v. Defendant

Lawyers' E-Responsibilities

- Define scope of preservation & production
- Initiate litigation holds directly with key players
- Reissue hold, oversee compliance & audit
- Know document retention policies & practices
- Understand systems & retention architecture
- Detailed preservation & production records

What is Required?

- Notify custodians of preservation obligations
- Save relevant information
- Suspend deletion/overwriting of current and backup media
- Stop destruction of back-ups if *sole* source of information
- Stop recycling of computers, crashed hard drives
- Periodically monitor compliance with the hold

Illustrative Case

- *Treppel v. Biovail Corp*., 249 F.R.D. 111 (S.D.N.Y. 2008): Equates the duty to preserve upon reasonable anticipation of litigation with the same reasonable anticipation of litigation test required to claim work product protection. In other words, if you claim that a document is protected by then work product doctrine then you should be preserving ESI at the same time.

Principle 1.03 (Discovery Proportionality)

- The proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C) should be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable

Cloud Storage – where data is stored online on virtual servers, as opposed to dedicated servers, generally hosted by third parties.

II. The Search for and Production of Documents

Search & Production of Documents

- ABA Model Rule 1.1 -“A lawyer shall provide competent representation to a client.
  - Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”
- ABA Model Rule 1.3 - “A lawyer shall act with reasonable diligence and promptness in representing a client.”

Search & Production of Documents: ABA Model Rule 3.4

- A lawyer shall not:
  a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potentially evidentiary value. A lawyer shall not counsel or assist another person to do any such act….
  b) in pretrial procedure, . . .fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party; . . ."

Fed. R. Civ. P. 26(b)(2)(B): *Specific Limitations on Electronically Stored Information*

- A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.
- On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost.
- If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C).

Considerations for Production

- Who?
  - Custodians, IT, employees, etc.
  - Necessity of vendor or IT assistance?
- What?
  - Scope of production
- Where?
  - Servers, databases, computers, discs, flash drives, backup tapes etc.
  - Accessible and Inaccessible Data?
- When?
  - Past, present, and ongoing

Illustrative Cases

- Counsel has an “affirmative” obligation to ensure relevant documents are discovered and produced. (*Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004))
- Counsel is expected to take necessary steps to ensure that relevant records are preserved when litigation is reasonably anticipated and that such records are collected, reviewed and produced to the opposing side. (*Pension Committee v. B of A Securities, LLC,* 685 F. Supp. 2d 465, 477 (S.D.N.Y. 2010))

Illustrative Cases

- *Qualcomm Inc. v. Broadcom Corp*., 2008 U.S. Dist. LEXIS 16897 (S.D. Cal. March 5, 2008):
  - court noted that the company failed to heed warning signs that its document searches and productions were inadequate
  - emphasizes the importance of communication in preservation

Illustrative Cases

- *Pension Committee v. B of A Securities, LLC,* 685 F. Supp. 2d 465, 477 (S.D.N.Y. 2010): failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information
- *Rimkus Consulting Grp. Inc. v. Cammarata,* 688 F. Supp. 2d 598 (S.D. Tex. 2010): preservation or discovery conduct depends on what is reasonable and proportional

Principle 2.02 (E-discovery liaisons)

- Technical disputes
- Communicate with all parties
- Communicate with the court

Predictive Coding

- For information on predictive coding see:
  - Andrew Peck, U.S. Magistrate Judge for the Southern District of New York, *Search, Forward,* LAW TECHNOLOGY NEWS, (Oct. 1, 2011).
  - Robert Alan Eisenberg, Anne S. Peterson & Daniel D'Angelo, *Predictive Coding Primer*, BNA Digital Discovery & e-Evidence, (Oct. 27, 2011).
  - Karl A. Schieneman, *The Top Ten Coding Mistakes and How to Avoid Them*, BNA Digital Discovery & e-Evidence, (Oct. 27, 2011).

Predictive Coding

- For information on predictive coding see:
  - Dave Walton, *Manage ESI Dangers With Targeted Collections*, LAW TECHNOLOGY NEWS, (Nov. 3, 2011).
  - Kathryn Walker, Anthony McFarland & Lucas Smith, *Technology is the problem. It's also the solution; Resistance to change is futile, but tools exist to help cope with the scale of discovery*, THE NATIONAL LAW JOURNAL, (Aug. 22, 2011).
  - Victor Li, *The Electronic Eye; Will Computers replace lawyers in document review?,* THE AMERICAN LAWYER, (Nov. 1, 2011).

III. Preservation of Confidential & Privileged Information

Attorney-client Privilege

- Applies
  - Where legal advice of any kind is sought
  - From a professional legal adviser in her capacity as such
  - The communications relating to that purpose
  - Made in confidence by the client
  - Are at his instance permanently protected
  - From disclosure by himself or by the legal adviser. *United States v. White,* 950 F.2d 426, 430 (7th Cir. 1991).

Attorney-client Privilege (cont'd)

- Must first establish an attorney-client relationship. *Matter of Walsh*, 623 F.2d 489, 493 (7th Cir. 1980).
- Not all communications are protected. *Id.*
  - Privilege does not apply to client seeking business advice. *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1036 (2d Cir. N.Y. 1984)

Work-Product Protection

- Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared **in anticipation** of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). FRCP 26(b)(3).
- If not made in anticipation of litigation, then not shielded by the work-product doctrine. *See Rockies Express Pipeline LLC v. 58.6 Acres,* 2009 U.S. Dist. LEXIS, 121618 2009 WL 5219025, at *6 (S.D. Ind. 2009) .

Duties to Clients

- **ABA Model Rules of Prof. Conduct**
  - **Model Rule 1.6(A):** "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation.
- **Code of Prof. Responsibility**
  - **Canon 4:** "A lawyer should preserve the confidences and secrets of a client."
  - **Ethical Consideration 4.4:** "…ethical obligation of a lawyer to guard the confidence and secrets of his client.
  - **Disciplinary Rule 4 101(B):** "a lawyer shall not knowingly reveal a confidence or secret of his client."

Costs of Privilege Review

- Privilege review is often the single most expensive aspect of the discovery process. Anything that can be done to limit that expense can benefit both your client and the process itself.
  - FRCP 26(b)(5)(B)/FRE 502
  - Claw Back Agreements
  - Quick Peek Agreements
  - Use the Technology

Confidential Information

- Duty to Protect from Public Disclosure
  - Personal identifiers
  - Personal financial information
  - Medical information/HIPAA

FRCP Rule 26(b)(5)(B): Safe Harbor Rule

- The 2006 amendments to the Fed. R. Civ. P. added the so called “safe harbor”, Rule 26(b)(5)(B), in recognition that the privilege could more easily be waived when parties are dealing with large volumes of electronic information.

Process on Inadvertent Disclosure **Safe Harbor Rule**

- Federal Rules
  - The 2006 amendments to the Fed. R. Civ. P. added the so called “safe harbor”, Rule 26(b)(5)(B), in recognition that the privilege could more easily be waived when parties are dealing with large volumes of electronic information.
  - The rule provides that if a party produces privileged information or work product, the recipient must return or destroy the information, or “sequester” it and not use it or disclose it, on receipt of notice from the producing party. The receiving party can seek a court determination as to whether privilege has been waived. The receiving party can’t use potentially privileged or protected material after notice from the producing party until the issue is resolved.

FRE 502

- Problem Rule 502 tries to resolve
  - In complex litigation the lawyers spend significant amounts of time and effort to preserve the privilege and work product. The reason is that if a protected document is produced, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case and document but to other cases and documents as well. Moreover, an enormous amount of expense is put into document production in order to protect against inadvertent disclosure of privileged information, because the producing party risks a ruling that even a mistaken disclosure can result in a subject matter waiver. Advisory Committee Notes

FRE 502 (cont'd)

- Effective Date: proceedings commenced after September 19, 2008 and, insofar as is "just and practicable", in all proceedings pending on September 19, 2008.
- Rule 502 applies to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

Waiver Analysis Before FRE 502

- Strict: Always waived—*See Fed. Deposit Ins. Corp. v. Singh*, 140 F.R.D. 252, 253 (D. Me. 1992).
- Intent Based: Not waived unless *intentional—See Jones v. Eagle-North Hills Shopping Ctr., L.P.*, 239 F.R.D. 684, 685 (E.D. Okla. 2007).
- Majority Approach: not waived if disclosure inadvertent. *Alldread v. City of Grenada*, 988 F.2d 1425, 1433-34 (5th Cir. 1993).

FRE 502 (cont'd)

- Subject Matter Waiver
  - Pre Rule 502: Any waiver could lead to subject matter waiver. *See e.g.*, *Texaco Puerto Rico, Inc. v. Dept. of Consumer Affairs*, 60 F.3d 867, 883-84 (1st Cir. 1995).
  - Rule 502(a) & (b): "subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver." 502(a) Advisory Committee Note

FRE 502 (cont'd)

- 502(a) **Scope of a Waiver**: when the disclosure is made in a Federal proceeding and waives the privilege/protection, the waiver extends to an undisclosed communication or information in a Fed or State proceeding ONLY if:
  - The waiver is intentional:
  - The disclosed & undisclosed communications concern the same subject matter; and
  - Ought in fairness be considered together

FRE 502 (cont'd)

- 502(b) Inadvertent Disclosure—the disclosure does not operate as a waiver if
  - The disclosure is inadvertent
  - The holder of the privilege or protection took reasonable steps to prevent disclosure; AND
  - The holder promptly took reasonable steps to rectify the error

Illustrative Cases

- *Heriot v. Byrne*, 257 F.R.D. 645 (N.D. Ill. Mar. 20, 2009)
- *Containment Technologies Group, Inc. v. American Society of Health System Pharmacists*, 2008 WL 4545310, 2008 U.S. Dist. LEXIS 80688 (S.D.Ind. Oct. 10, 2008).
- *Alcon Mfg., Ltd. v. Apotex, Inc.*2008 WL 5070465, 2008 U.S. Dist. LEXIS 96630 (S.D. Ind. Nov. 26, 2008)

Review Considerations

- When manual review is outsourced:
  - In *Heroit*, the defendant was accused of copyright infringement. During discovery, the vendor that the Plaintiff used for document processing produced a significant number of privileged documents. Two months later, when Plaintiff discovered the mistake, it sought to get the information back. The judge, applying Fed.R.Evid. 502, found that there was no waiver because the release of information had been inadvertent and Plaintiff had sought the return of the information immediately on learning about the release. **Heriot v. Byrne, 257 F.R.D. 645 (N.D. Ill. Mar. 20, 2009).**

Illustrative Cases

- ***Containment Technologies Group, Inc. v. American Society of Health System Pharmacists*, 2008 WL 4545310, 2008 U.S. Dist. LEXIS 80688 (S.D.Ind. 2008):** it's easier, more efficient and less expensive to "over designate" records than to "engage in a painstaking process of document by document (or even paragraph by paragraph) review…"

- ***Alcon Mfg., Ltd. v. Apotex, Inc.*, 2008 WL 5070465, 2008 U.S. Dist. LEXIS 96630 (S.D. Ind. 2008):** the Plaintiff did not waive its attorney□client privilege as it took "prompt remedial action" to identify the owners of handwritten notations and specifically assert privilege

FRE 502 Inadvertent Cases

- *Compare Silverstein v. Federal Bureau of Prisons*, 2009 WL 4949959, 2009 U.S. Dist. LEXIS 131357 (D. Colo. 2009).
  - finding "inadvertent" in 502(b) mandates a remedy for an unintended, rather than mistaken, disclosure)
  - No FRE 502 protection when disclosure and requested return were 1-year apart
- *With Amobi v. District of Columbia Dept. of Corrections*, 362 F.R.D. 45, 53 (D.D.C. 2009)
  - finding inadvertent included mistaken disclosures)

FRE 502 (e) & (d)

- 502(e) **Controlling effect of a party agreement:** An agreement on the effect of disclosures …is binding only on the parties to the agreement, unless it is incorporated into a court order.
- 502(d) **Controlling effect of a Court Order**: A court order that the privilege or protection is not waived by disclosure in the pending litigation also applies to any other Federal or State proceeding
  - Contemplates the use of claw-back arrangements "as a way to avoid the excessive costs of pre-production review for privilege and work product"

Clawback Agreements

- Assumes that there will be some review, but provides protection when something is inadvertently produced. Always a good idea, but it may not provide complete protection if a party is not careful and/or does not react in a timely manner when there is a concern that privileged information has been released.

Claw Back Agreements

- Source/Authority of Court
  - Under FRCP 26(c)(1), "The Court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including …(B) specifying terms, including time and place, for the disclosure or discovery."
  - *See Rajala v. McGuire Woods LLP*, 2010 U.S. Dist. LEXIS 73564, 2010 WL 2949582, at *5 (D. Kan. 2010) (holding "that the entry of an order containing a clawback provision falls within the purview of Rule 26(c)(1)" and that the Court has authority to enter a clawback provision over a party's objection).

Claw Back Agreement

- Source/Authority of Court
  - Contemplated by 502(d) “Under [Rule 502], a confidentiality order is enforceable whether or not it memorializes an agreement among the parties to the litigation. Party agreement should not be a condition of enforceability of a federal court's order.” 502(d) Advisory Committee Note

Clawback Agreements

- FRE 502(b) - Inadvertent disclosure
- FRE 502(d) - Controlling Effect of a Court Order
- FRE 502(e) - Controlling effect of a party agreement
- FRCP 26(c)(1): grants authority to issue these orders

Claw Back Agreement

- Issue with Claw back agreements
  - Use of the word "inadvertent," which is a term of art
  - Risk—Only "inadvertent" disclosures trigger the application of the agreement. Court applies a Rule 502 analysis to determine whether the disclosure was inadvertent. If not inadvertent, then claw-back agreement does not apply
  - *See Callan v. Christian Audigier, Inc*., 263 F.R.D. 564, 566 (C.D. Cal. 2009) Motion to compel compliance with a claw back agreement denied because court determined that the defendants failed to prove their production was inadvertent.
  - *See also Kandel v*. *Brother Intern. Corp.,* 683 F. Supp 2d 1076, 1086. Claw back agreement used the phrase "inadvertent production" and stated that it should not be construed to alter the legal definition of "inadvertent." The Court essentially analyzed the disclosure under Rule 502.

Claw Back Agreement

- Example
  - "Privileges Not Waived By Production ("Claw-Back" Agreement). A party who produces material or information without intending to waive a claim of privilege does not waive that claim, and any privilege is preserved, if – within 30 days after the producing party actually discovers that such production was made – the producing party notifies in writing the persons to whom the documents were produced, identifying the material or information produced, and stating the privilege asserted. If the producing party thus asserts a privilege, the persons to whom the documents were produced must promptly return the specified material or information and any copies pending any ruling by the Court denying the privilege. This provision is intended to be construed broadly against waiver of a privilege, and applies whether or not the material produced is derived from ESI."

Claw Back Agreement

- Recommendation
  - Instead of using “inadvertent” use “unintentional” or even better, “expressly authorized by the individual or entity who controls the privilege.”

Quick Peek

- Concept: an agreement that allows the opposing party to review the producing party's documents for relevance before any privilege review has taken place. *See* The Impact of Electronic Discovery on Privilege and the Applicability of the Electronic Communications Privacy Act, 38 Loy. L.A. L. Rev. 1683, 1722 (Sum. 2005).
- Needs to be included in a Court Order for FRE 502 protection
- Hybrid Quick Peek

Quick Peek Agreements

- Requires client approval
- Must be in a court order under FRE 502(d)
- Unlike a claw-back agreement, need agreement from BOTH sides

Another Tool: Protective Orders

- Best way to protect information is to limit disclosure even among counsel

Use the Technology

- Use the available technology to limit the costs of privilege review.
  - Searches for potentially privileged WP documents
  - Requires cost/benefit discussion with client
  - No cookie-cutter approach

Lawyers' E-Responsibilities

- To review or not review?
- If no review is done prior to turning over documents, a party would usually rely on an agreement to preserve the privilege
- If documents are reviewed, that can be done electronically or manually, identifying privilege through key word searches or by manual attorney review.

What about Metadata?

- Another issue related to confidential information is whether metadata is considered confidential and, thus, subject to attorneys' ethical obligations that apply when they have reason to believe that they have received information that was turned over inadvertently.

- The ABA has issued an opinion that receiving counsel have no ethical issues if they review metadata. See ABA Formal Op. 06-442. Maryland follows this as well.

- Alabama, Washington, D.C., New York and Florida, however, have taken the opposite position, that metadata is confidential information and cannot be viewed if it is included in a production. The ABA and Maryland positions, however, do not relieve counsel of their obligation to protect clients' confidential information, meaning that care should be taken to avoid metadata, if confidential, from being produced.

- Some courts distinguish between types of metadata: (1) substantive, (2) embedded and (3) system generated, and then base what is considered confidential on the type of metadata. See Matter of Irwin, 72 A.D.3d 314, 321 (N.Y. App. Div. 2010).

Metadata: Information About Information

- Substantive: embedded in a document/data
  - Information in a Word document
- System: automatically generated
  - Example: name of author
- Embedded
  - Formula in an Excel document

- *Matter of Irwin,* 72 A.D.3d 314, 321 (N.Y. App. Div. 2010).

Document review handled by contract attorney's, staffing agencies or non-attorneys

IV. Duty to Supervise

Duty to Supervise

- Vetting the vendor
- Training & educating
  - Relevant documents
  - Privilege rules
  - Developing policy

Constant involvement by retained counsel

ABA's Proposed New Comment to Rule 1.1: Competence

- To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Rules Regarding Supervision

- Rules of Professional Responsibility Generally: attorneys are required to supervise those that they oversee
- FRCP 26(g): all responses, requests, and objections be signed by counsel in order to be effective

Illustrative Cases

- *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC,* held that attorneys can be held liable for failing "to sufficiently supervise or monitor their employees' document collection." 685 F. Supp. 2d 465, 477 (S.D.N.Y. 2010).

Illustrative Cases

- Attorneys have a responsibility for ensuring the adequacy and accuracy of discovery.
- *Rimkus Consulting Grp. Inc. v. Cammarata*, 688 F. Supp. 2d 598 (S.D. Tex. 2010)
- *Orbit One Commc'ns Inc. v. Numerex Corp*., 271 F.R.D. 429 (S.D.N.Y. 2010)
- *Surowiec v. Capital Title Agency Inc*., 2011 WL 1671925, 2011 U.S. Dist. LEXIS 48011 (D. Ariz. May 4, 2011).

Illustrative Cases

- ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008) - attorney of record is responsible for the results of the entire legal team, including any outside vendors. *Id* at 2. “A lawyer may outsource legal or nonlegal support services provided the lawyer remains ultimately responsible for rendering competent legal services to the client." *Id.* at 1.

Illustrative Cases

- *J-M Manufacturing Co. Inc. v. McDermott Will & Emery* filed on June 2, 2011, in Los Angeles Superior Court (Case BC462832)
- The suit alleges that McDermott lawyers "negligently performed limited spot-checking of the contract attorneys' work," leading to the disclosure of about 3,900 privileged or irrelevant documents. Also includes allegations regarding significant markups of contract lawyers' fees.

Illustrative Cases

- *Lawson v. Sun Microsystems, Inc*. 2009 WL 5842136, 2009 U.S. Dist. LEXIS 124768 (S.D. Ind. 2009); 2010 WL 503054, 2010 U.S. Dist. LEXIS 10860 (S.D. Ind. 2010): found that attorneys' failure to supervise their client did not equate to "sanctionable," wanton conduct when their client sent them unlocked, password protected privileged documents received from Defendant.

Illustrative Cases

- *Promote Innovation LLC v. Roche Diagnostics Corp.* 2011 WL 3490005, 2011 U.S. Dist. LEXIS 87995 (S.D.Ind. 2011): Court payment of electronic discovery related costs to prevailing party based on prevailing party's efficient practices such as data culling and application of search terms.

Lessons Learned: Preservation

- Good advocacy matters
- Good faith required
- Need to learn the client's computer systems
- Need to communicate with key players
- Need to monitor clients → active supervision!

Lessons Learned: Processing & Production

- Reasonable inquiry required
- Counsel cannot turn a blind eye
- Familiarity with client's computer systems
- Understand the costs involved
- Form of production & metadata
- Early proportionality meet and confer

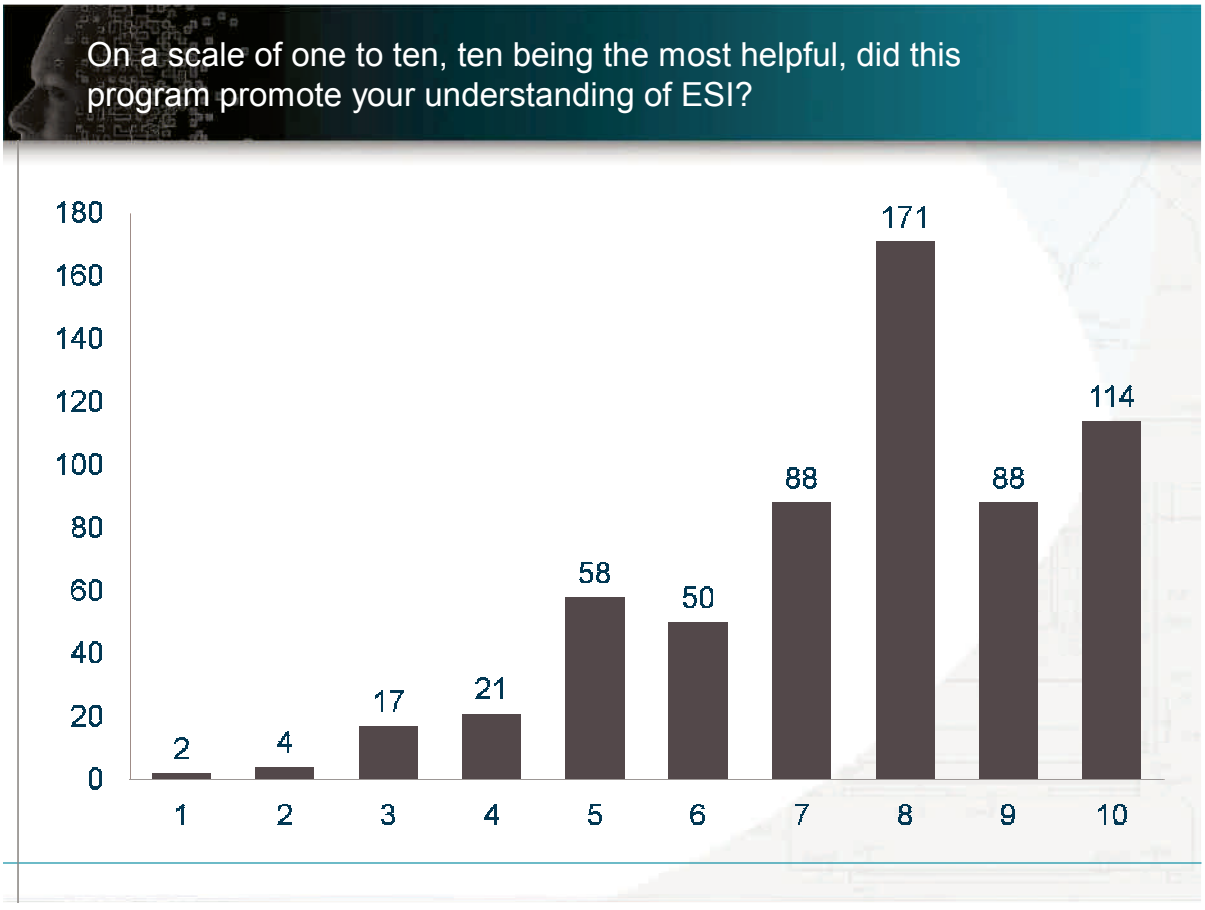
5. March 28, 2012
“ESI 101"

ESI 101 Frequently Asked Questions, Poll and Survey Results

Disclaimers: All of the disclaimers recited in the live event, also apply to the FAQ list. These responses reflect the opinion of the author alone and are not to be taken as legal advice on any specific situation.

1. Is it worth my time to watch this program?

This is a good technical overview if you have no prior experience or technical background on ESI issues. Participants in the live event were asked to rate this program on a scale of 1-10 in terms of whether or not it helped their understanding of ESI:



2. How do I get CLE credit?

CLE credit is only available for participation in the live event. CLE credit is not available for viewing the recorded event on the discoverypilot.com site. Certificates of attendance will be sent to all participants from Wisconsin and Illinois, for whom we can verify participation using all technical means available to us, in about two weeks. You will need to submit the appropriate paperwork to your state to perfect your claim for CLE credit. We use a combination of responses to Polls, IP address connection logging, survey responses, and live dialogue to confirm attendance. The event was fully subscribed in advance. Unfortunately, with such a large event there are always individual instances where participants are unable, for technical reasons, to connect to the live event; we regret that we cannot certify attendance for unsuccessful participation.

3. Could I get a copy of the slides please?

The webinar is available for review on the discoverypilot.com web site, and the slides can be downloaded as a .pdf file from the site. If you are interested in editable copy, please contact the author privately at GSchodde@mcandrews-ip.com.

4. What preservation obligations do I have with respect to ESI?

Generally, the obligation to preserve ESI is no different than the obligation to preserve any other evidence. Principles 2.03 and 2.04 of the 7th Circuit Electronic Discovery Committee further discuss ESI preservation issues.

See http://www.discoverypilot.com/sites/default/files/Principles8_10.pdf. A summary of a number of cases and a Seventh Circuit Analysis is contained in the previously broadcast webinar, "The Four Ps of E-Discovery", under the "Preservation" section, also on the discoverypilot.com web site. See http://www.discoverypilot.com/sites/default/files/the_4_p_of_ediscovery.pdf.

5. If information is on paper and opponent asks for it to be produced electronically, am I required to convert it for them or can I deliver it in paper, charge for the copies, and tell them to convert it themselves?

If the original documents are in paper, it requires no translation to make it reasonably useable and is not ESI. If ESI is printed, note that Rule 34 allows your opponent to seek ESI in "native form" or "other useable form." The process of conversion from electronic, to paper, back to electronic in this fashion, eliminates all metadata and degrades the use of electronic text retrieval tools, as well as causing unnecessary costs. See Kershaw & Howie, Judge's Guide to Cost-Effective E-Discovery, Electronic Discovery Institute, October 1, 2010 at section 13, pages 17-18 (describing print-scan as a "worst practice").

6. What are the security measures for ESI in clouds? How do the cloud providers back-up the data in case something happens in their facility?

The security and disaster recovery measures taken by cloud storage providers is beyond the scope of this event, however note that the attraction of using cloud services is that the cloud provider can leverage their scale and specialization in storage to provide services that may be more robust and/or more secure than what a small scale enterprise can execute internally. Note also, that if cloud storage is being used for backup, there is geographic diversity since the cloud provider's server location(s) are probably distant from the user's location.

7. Can the reviewer be "tricked" by changing the file extension, so that for example, a ".doc" file is renamed a ".exe" file and isn't selected for review?

Visually, this is possible, any file can be renamed. However, software tools are available that will ignore the label and inspect the actual file to determine whether it is in fact, an executable application. These tools can be used to filter applications out of a collection and eliminate this concern.

8. What are "forensically sound copying tools"

A tool that makes an accurate copy of the file without altering it, such that at least the application and system level metadata is preserved. In some cases, such as cases where deleted files are in issue, it may be necessary to make copies that are true "mirrors" or "bit level" copies of media, which will include the information in things like disk slack space and sectors that have been released but not written over at all.

9. Does getting a "read only" copy of the file solve the problem of changing the metadata?

Setting a file to "read only" keeps the file's contents from being changed, but it doesn't address how the read only copy was made. A copy from one drive to another, may still reflect the file modification/created dates and user information associated with the new drive, even if the copy is set to "read only." The "read only" copy will of course contain all the application level metadata, that the original file contained.

10. Is metadata copied when the information in a word doc is copied & pasted into a new document as opposed to making a copy of the .doc file?

The system level metadata, that is the information tracked by the operating system about the first and original file, is not affected other than it may show that the file was accessed. The new document will have its own system metadata reflecting its own creation date, last modified date, file name, and so on. Any application level metadata in the copied text, will also be embedded in the new document.

11. So my best bet might be to sit down with my retrieval specialist, someone from the company who knows the systems used, *and* opposing counsel, to define the search or preservation criteria?

Generally, resolving issues early is highly recommended. Principles 1.02, 2.01, and 2.02 suggest that an informed, transparent, early and cooperative process for resolving electronic discovery issues is the best approach.

12. Will the Hash value search tool distinguish identical files with different metadata?

Hash de-duplication works by identifying files that have different system level metadata, for example, different file names, but identical content. If the file contents differ, even slightly, the hash values will be different.

13. Will the algorithms assign a nearly identical hash to the same data in different form, e.g., a Word document and its pdf copy?

No. The value produced by a hashing algorithm does not measure "closeness"; in this particular case, the values produced by a hash algorithm for these two files will bear no relationship to each other at all – hashing algorithms are designed to generate differing values even for files that contain similar, but not identical content. Different tools are used to measure "near duplication", which is the process of identifying groups of closely related files that have the same or nearly identical content, which requires comparing text files looking for degrees of similarity.

14. Would the use of a thumb drive on a desktop computer leave any information on the desk top hard drive that a thumb drive was used?

Yes. Most desktop computers will register the ID of any drive connected including a thumb drive, which typically includes the serial number of the drive, and log when it was last connected. See e.g., http://www.forensicswiki.org/wiki/USB_History_Viewing; see also http://www.appleexaminer.com/MacsAndOS/Analysis/USBOSX/USBOSX.html. Some organizations install DLP (Data Loss Prevention) tools that log more detail regarding what devices are connected and disconnected as well as track file transfers. These log files are important evidence sources in data theft cases.

15. Are there any established standards in the courts for maintenance of metadata during discovery?

The standard for maintenance of metadata is still evolving. Absent agreement, the author's recommendation is to collect files in native

format while preserving system and application metadata, since even if it is ultimately not produced for one reason or another, software and search tools for working with ESI collections are more effective if the original metadata is intact.

16. Understanding that each case is probably different, as a general rule do the costs for securing and disclosing ESI information run in the thousands of dollars or tens of thousands?

The cost for a given ESI project is highly variable. The committee has endorsed the concept of proportionality, suggesting that the cost of the discovery should be proportional to the issues at stake. Principle 1.03; see also Fed. R. Civ. P. 26(b)(2)(B) and (C).

17. Any basis or authority to insist on translations from a foreign language to English?

Foreign language translations are beyond the scope of this program; there are no special rules when the original foreign document is in electronic form. Note however, that as automated translation software continues to improve, there are possibilities for low cost, uncertified electronic language translation as a discovery tool that are not available or less effective for paper documents.

18. Are natural language searches on Westlaw "statistical ranked" searches?

Yes. See e.g., http://nlp.stanford.edu/IR-book/html/htmledition/the-extended-boolean-model-versus-ranked-retrieval-1.html

19. What does it mean to produce ESI "in its native form"? Does that just mean any type of TIFF file?

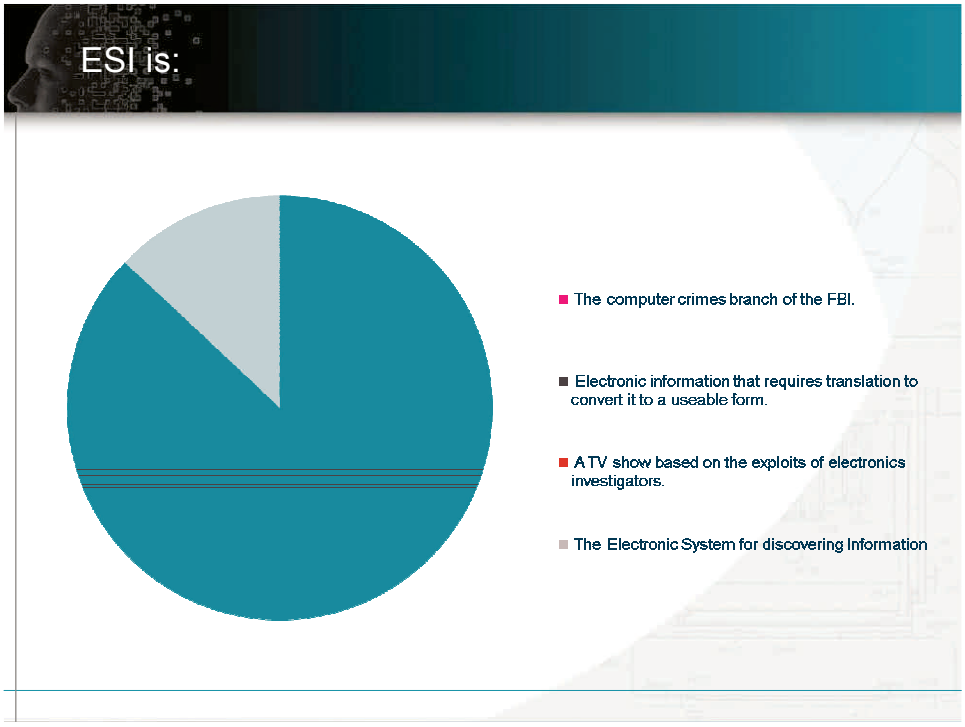
A "native" ESI production means to produce the file as it exists in the client's system. To review it, the original application that created it or a "viewer" that emulates the original application is used to open and view

the file. "TIFF" files are not "native" in this sense unless that was the format the client held the file in.

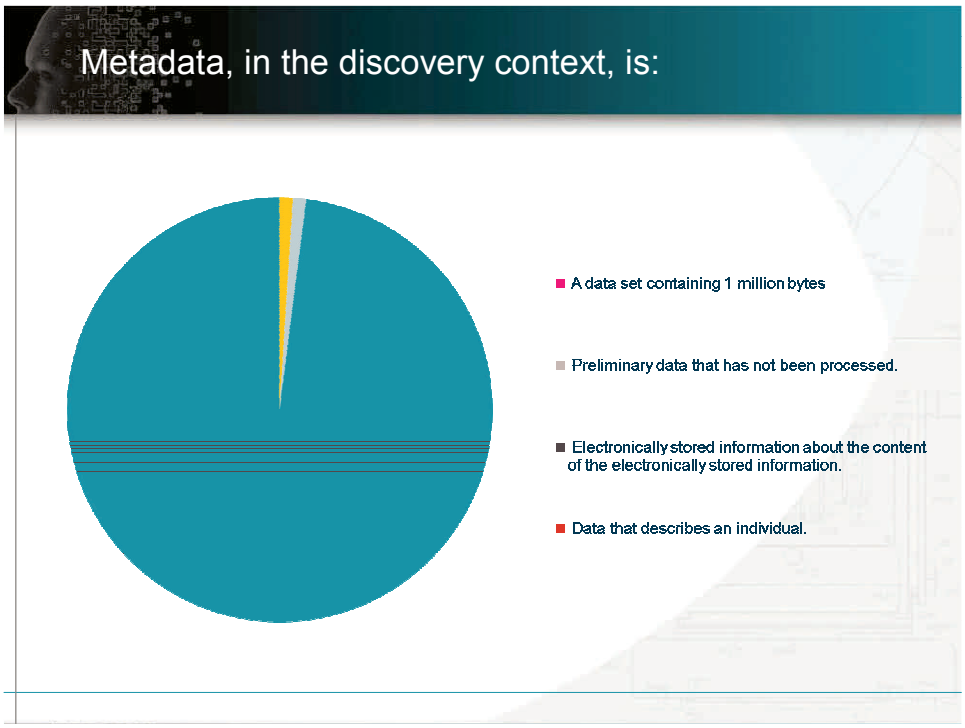
20. In Windows Explorer, does moving a file save the metadata? What about copying a file? Does it make a difference if I transfer to the same drive versus a different drive?

The application level metadata will be preserved by moves and copies made this way. However, system timestamp and file location information will or may be affected. The file location information is particularly vulnerable. For example, suppose responsive files are selected and moved or copied to a single new folder for production. All of the subfolder and original drive location information is lost in this operation, which can make it difficult to later determine the original custodian of the file. To accurately protect system and application level metadata, a file copy tool designed to copy files for ESI production that preserves metadata is the safest practice.

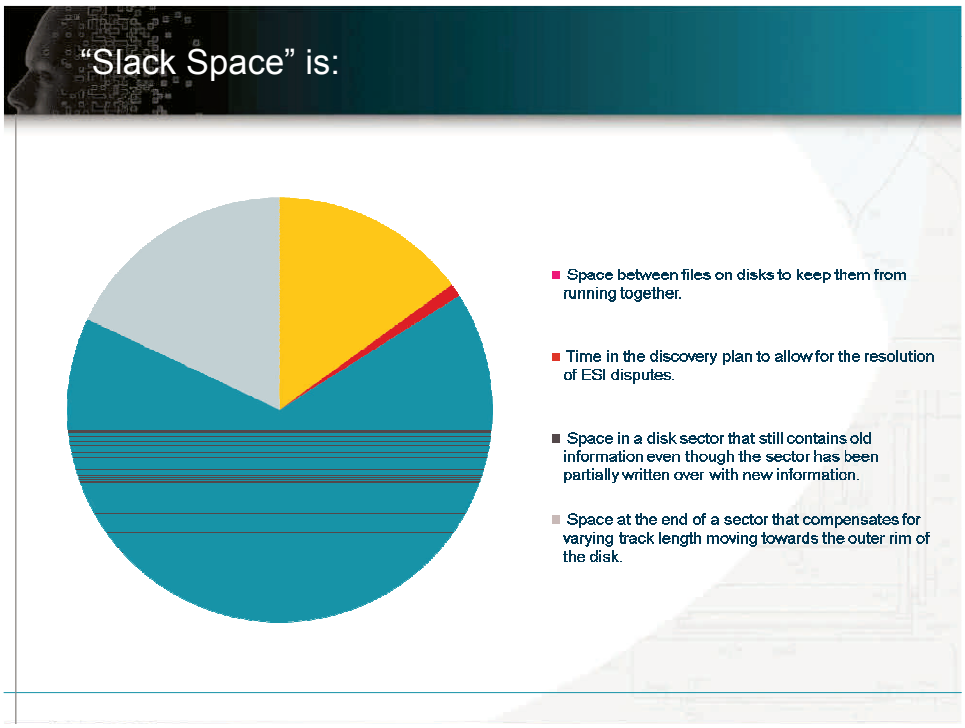
Other Survey and Poll Responses
Poll No. 1



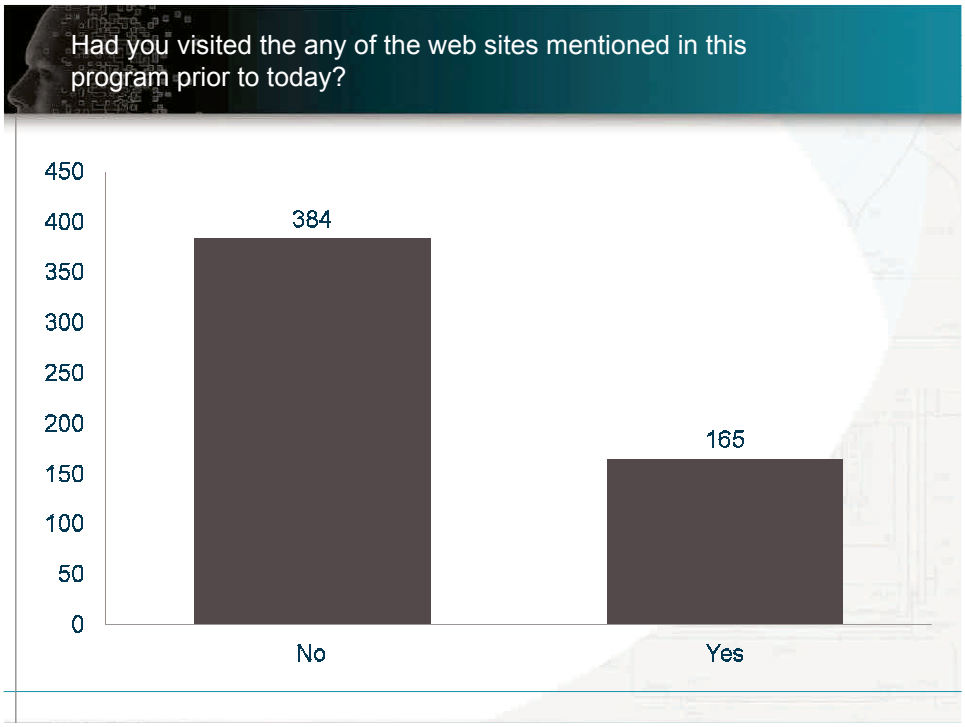
Poll No. 2

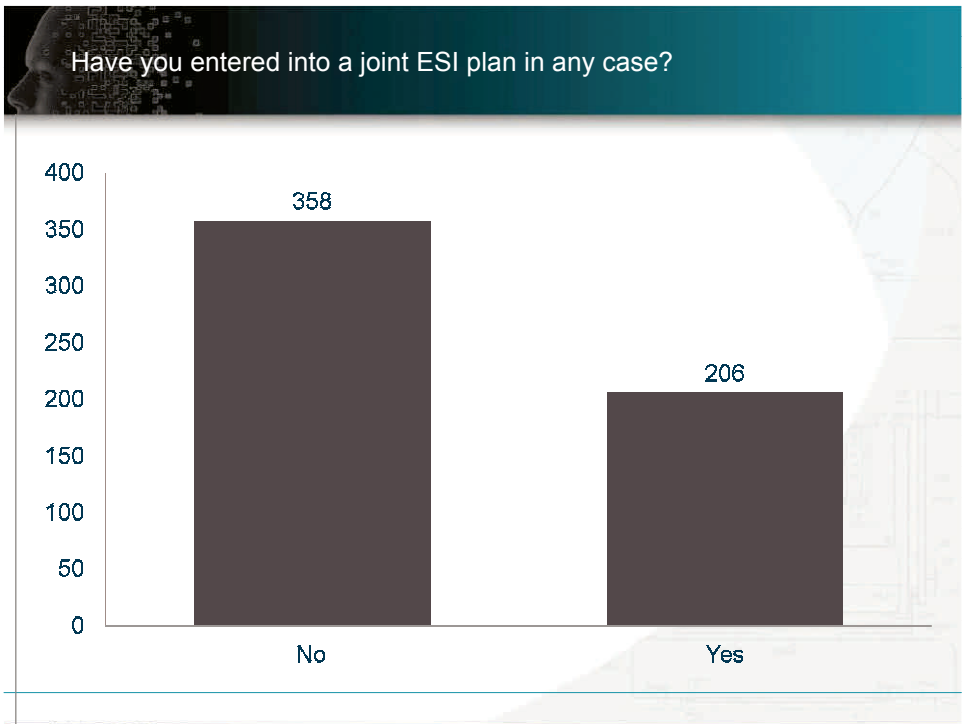


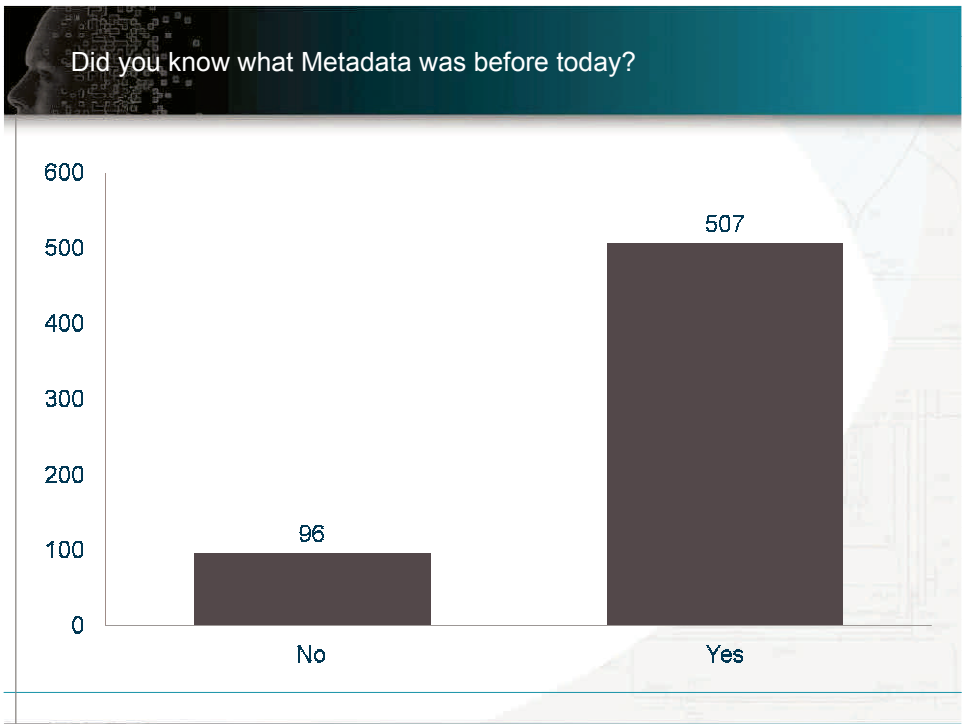
Poll No. 3



Survey Questions




Have you entered into a joint ESI plan in any case?
400
350
300
250
200
150
100
50
0
358
206
No
Yes


Did you know what Metadata was before today?
600
500
400
300
200
100
0
96
507
No
Yes

6. January 18, 2011, October 18, 2011, and April 18, 2012 E-Discovery Expert Attorney Jonathan Redgrave presented "The 4 P's of Electronic Discovery: Preservation, Proportionality, Privilege, and Privacy"

The 4 P's of eDiscovery: Proportionality, Privilege, Preservation & Privacy

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CLIENT DRIVEN TECHNOLOGY

REDGRAVE LLP
INFORMATION MATTERS


Discovery Pilot
Seventh Circuit Electronic Discovery Pilot Program

Program Overview

- Examine Each "**P**"
  - State of the Law
  - FAQs
  - Resources

- Focus is on another "**P**" – **P**ractical

- Approach is **P**arty-neutral: Looking at law as it applies to requesting and responding parties; plaintiffs and defendants

Proportionality

The starting point is RELEVANCE

(b) Discovery Scope and Limits.

(1) Scope in General.

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense — including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.

…

For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

Proportionality

- The scope of Fed. R. Civ. P. 26(b)(1) is limited by, among other things, the balancing test set forth in Rule 26(b)(2)(C), which provides that the court may limit discovery if:

> **…the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.**

- Parties and courts should keep in mind that this Rule is a direct extension of Rule 1, which focuses all of the Civil Rules on the "just, speedy, and inexpensive" determination of all matters.

Proportionality

- Fed. R. Civ. P. 26(b)(2)(B) Specific Limitations on Electronically Stored Information.

  A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

- Fed. R. Civ. P. 26(f)(3) Discovery Plan.

  A discovery plan must state the parties' views and proposals on:

  (A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

  (B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

  (C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

  (D) any issues about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order;

  (E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

  (F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

Proportionality

- Test is mostly "Micro," not Macro

- Seventh Circuit Principle 1.03 (Discovery Proportionality)

The proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C) should be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable.

Proportionality

Tamburo v. Dworkin, 2010 WL 4867346, at *3 (N.D. Ill. Nov. 17, 2010)

Citing the Sedona Conference on Proportionality and stating:

"'Rule 26(b)(2)(C)(iii) provide courts significant flexibility . . . to ensure that the scope and duration of discovery is reasonably proportional to the value of the requested information, the needs of the case, and the parties' resources' . . . . Accordingly, to ensure that discovery is proportional to the specific circumstances of this case, and to secure the just, speedy, and inexpensive determination of this action, the Court orders a phased discovery schedule. . . . During the initial phase, the parties shall serve only written discovery on the named parties. Nonparty discovery shall be postponed until phase two, after the parties have exhausted seeking the requested information from one another. . . .

Proportionality

Tamburo v. Dworkin, 2010 WL 4867346, at *3 (N.D. Ill. Nov. 17, 2010)

Continuing:

"". . . [T]he parties should focus their efforts on completing their Rule 26(a) [initial disclosures] before proceeding to other discovery requests. Second, the parties should identify which claims are most likely to go forward and concentrate their discovery efforts in that direction before moving on to other claims. Third, the parties should prioritize their efforts on discovery that is less expensive and burdensome."

Proportionality

Thermal Design v. Guardian Building Products, 2011 WL 1527025, at *1 (E.D. Wis. April 20, 2011)

Pursuant to the parties' Agreement for Electronic Discovery, Defendants already produced more than 1.46 million pages (91 GB) of ESI. This production was the result of four months spent analyzing and collecting information, then another three months processing the data for production, at a total cost of almost $600,000. Even after receiving all of this information, Plaintiff claimed that it is entitled to more ESI specifically requesting that the Defendants search all archived email accounts and shared network drives without narrowing the scope by custodian. Defendants demonstrated that the ESI was not reasonably accessible as it would have taken several months and an additional $1.9 million to meet the request. The court held that Plaintiffs did not meet the burden to demonstrate that continued discovery was appropriate:

Proportionality

Thermal Design v. Guardian Building Products, 2011 WL 1527025, at *1 (E.D. Wis. April 20, 2011)

"Even if the information sought is relevant or reasonably calculated to lead to the discovery of admissible evidence, Thermal Design doesn't explain why the extensive amount of information it seeks is of such importance that it justifies imposing an extreme burden on the Guardian Defendants. Fed.R.Civ.P. 26(b)(2)(C)(iii) (factors include "the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues"). Courts should not countenance fishing expeditions simply because the party resisting discovery can afford to comply."

Proportionality

Break It Down & Factors You Should Consider:

- Relevance of proposed discovery. This is a fundamental gate-keeping question.
- Is the discovery sought from a party or a non-party?
- Does the discovery sought relate to a key player?
- Does the discovery relate to a key time period?
- Does the discovery relate to the core issues in the case?
- Does the discovery relate to a unique source of information?
- What are the burdens and costs involved?
- Is the information from a source that is not reasonably accessible?
- What is the amount in controversy?
- What is the relative importance of issues at stake in the case?
- What are the relative resources of the parties?

Proportionality

- How do you apply "proportionality" to a matter?
- Do separate rules for e-discovery apply to non-party subpoena recipients, and what analysis applies to cost shifting for document subpoenas to non-parties requesting emails off back-up tapes and archives?
- How do Courts balance the financial burden of extensive eDiscovery against the likelihood of relevant evidence?
- When/can the requesting party bear the costs?
- Do the Courts look at what is reasonable in terms of discovery costs vs. the amount in controversy?
- Are the Courts serious about enforcing proportionality or is it just a theoretical nicety?

Proportionality

- How can the costs of eDiscovery be managed in small/mid-sized cases?
- How do you make the case of proportionality to the Court?
- How does the concept of proportionality apply to preservation decisions?
- Is there any legal authority that puts a number to proportionality (i.e. where the amount in controversy is $X, discovery costs should be $Y)?
- What are some ways to convince courts to reduce the scope of discovery because the costs do not justify the likely benefit?

Proportionality

- Seventh Circuit Electronic Discovery Pilot Program (Oct. 2009)
- The Sedona Conference® Commentary on Proportionality (Oct. 2010)
- The Sedona Conference® Commentary on Achieving Quality in the E-Discovery Process (May 2009)
- The Sedona Conference® Cooperation Proclamation (2008)

Preservation

- Preservation – the duty to preserve relevant evidence for pending or reasonably anticipated litigation
- This is the battleground that gets the most attention because of the other side of the coin – spoliation
- Spoliation can lead to sanctions, such as:
  - imposition of costs
  - fines
  - adverse inference jury instructions,
  - default judgments
  - civil contempt citations
- This is an issue for both plaintiffs and defendants in the digital age of Web 2.0
- Just consider all of the "new" places you can find information for individuals and organizations…

Preservation

Proposed New Federal Rules?

- Category 1
  - Very specific preservation guidelines
  - Basic question: should such specifics be included in a Rule?
- Category 2
  - More general preservation rule, addresses specific concerns in a more general way but still provides front-end guidance
  - Basic question: Too general to be helpful?
- Category 3
  - Sanctions only "back-end" rule
  - Basic question: Can preservation be controlled solely by regulating punishment issues without further guidance?

Option 1

- Detailed and specific rule provisions
- Provides specific examples of data types that should be specifically included or excluded in preservation efforts
- Also discusses:
  - Format of preservation
  - Time frame for preservation of information
  - Number of key custodians whose data must be preserved
- Combines these specific directions with a Rule 37 sanctions proposal
  - Debate as to degree of bad-act required before sanctions are imposed (negligence, willful, bad faith, etc.)

Option 2

- General proposals that do not include any specific examples
- Example: Scope of duty to preserve: "A person's whose duty to preserve discoverable information in regard to the potential claim of which the person is or should be aware."
  - Note: No specific data types or data stores listed
  - Note: Debate whether to explicitly include a proportionality standard into the rule
- Also combines with Rule 37 Sanctions proposal similar to Category 1

Option 3

- Back-end rule provision governing sanctions determinations but not providing specific guidance regarding preservation standards
- Lists types of sanctions that may be awarded
- Suggests that sanctions only be permissible where actions were taken in "bad faith" and caused "substantial prejudice" in the litigation
- Major areas for debate
  - Would such a rule encourage motions for sanctions?
  - Is this approach acceptable to ensure uniform treatment of preservation/sanctions issues nationwide?

Preservation

Internal Collaboration:

- **SharePoint**
- **Office Communicator**
- **Yammer**

Internet:

- **Corporate Websites**
- **Agent Websites**
- **Third Party Websites**

Social Networking:

- **Facebook**
- **MySpace**
- **LinkedIn**

Blogs:

- **Blogger**
- **Twitter** (Considered a "micro-blog")

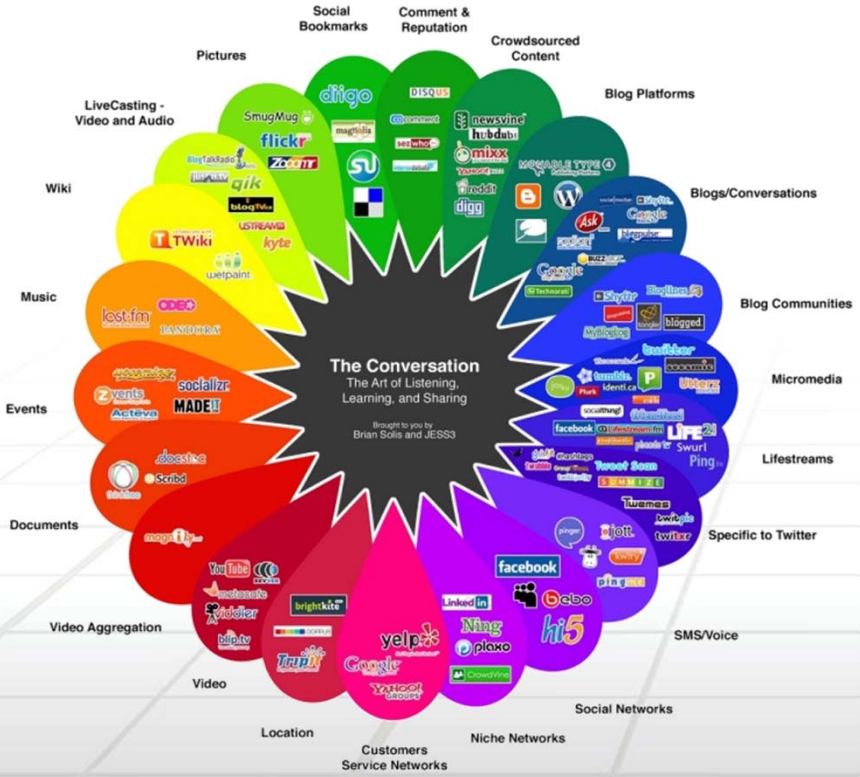
Virtual Worlds:

- **Second Life**
- **World of Warcraft**

Peer to Peer sharing Websites:

- **You Tube**
- **Yelp**

Preservation



Think you know Social Media?

Preservation

Preservation/Spoliation as the "Issue of the Past 2 Years"

- *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC, 685 F. Supp. 2d 456 (S.D.N.Y. 2010).*
  - Judge Shira Scheindlin, author of the *Zubulake* decisions, again addressed preservation and production issues in this case
  - Conduct ranging from merely negligent (failing to collect documents from persons not directly involved in the matters at issue) to "grossly negligent" (failing to collect information from key players and failing to preserve backup tapes) resulted in sanctions
  - Decision reiterates that there is not one set of discovery guidelines that must be followed for every case – discovery requirements are fact-dependent
  - Certain procedures should be a starting point for most cases, but specific processes depend on what is needed in each case
  - Parties and counsel must err on the side of preservation until they know where information is likely to be found
  - Adverse inference instruction issued

Preservation

- *Rimkus Consulting Group, Inc. v. Cammarata, 688 F. Supp. 2d 598 (S.D. Tex. 2010)*
  - Focus on proportionality
  - Like *Pension Committee*, notes that discovery obligations are fact-specific
  - Deals primarily with intentional destruction, rather than negligent loss of information
  - Addresses differing circuit laws, and notes that in some circuits, negligence alone can be the basis for adverse inference sanctions while not in most
  - Adverse inference instruction

Preservation

Preservation/Spoliation as the "Issue of the Past 2 Years"

- *Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497 (D. Md. 2010)*
  - Provides tour de force analysis of circuit differences
  - Recommended jail time for contemptuous behavior
  - District court adopted in large part

- *Orbit One Communications, Inc. v. Numerex Corp., 271 F.R.D. 429* (S.D.N.Y. 2010)
  - Written legal hold not always required
  - Proportionality may not be realistic in preservation
  - No sanctions without proof of prejudice

Analysis of Seventh Circuit Sanctions Law from *Victor Stanley II*

		Culpability and prejudice requirements					
Scope of Duty to Preserve	Can conduct be culpable per se without consideration of reasonableness?	for sanctions in general	for dispositive sanctions	for adverse inference instruction	for a rebuttable presumption of relevance	What constitutes prejudice	Culpability and corresponding jury instructions
Duty to preserve potentially relevant evidence party has control over. Jones v. Bremen High Sch. Dist. 228, No. 08-C-3548, 2010 WL 2106640, at *5 (N.D. Ill. May 25, 2010).	No: Breach is failure to act reasonably under the circumstances. Jones v. Bremen High Sch. Dist. 228, No. 08-C-3548, 2010 WL 2106640, at *6-7 (N.D. Ill. May 25, 2010). "The failure to institute a document retention policy, in the form of a litigation hold, is relevant to the court's consideration, but it is not per se evidence of sanctionable conduct." Haynes v. Dart, No. 08 C 4834, 2010 WL 140387, at *4 (N.D. Ill. Jan. 11, 2010).	Willfulness, bad faith, or fault. Jones v. Bremen High Sch. Dist. 228, No. 08-C-3548, 2010 WL 2106640, at *5 (N.D. Ill. May 25, 2010) (stating that fault is based on the reasonableness of the party's conduct). Bad faith. BP Amoco Chemical Co. v. Flint Hills Resources, LLC, No. 05 C 5, 2010 WL 1131660, at *24 (N.D. Ill. Mar. 25, 2010).	Willfulness, bad faith, or fault. In re Kmart Corp., 371 B.R. 823, 840 (Bankr. N.D. Ill. 2007) (noting that fault, while based on reasonableness, is more than a "'slight error in judgment'") (citation omitted)	Bad faith. Faas v. Sears, Roebuck & Co., 532 F.3d 633, 644 (7th Cir. 2008).	Unintentional conduct is insufficient for presumption of relevance. In re Kmart Corp., 371 B.R. 823, 853-54 (Bankr. N.D. Ill. 2007).	When spoliation substantially denies a party the ability to support or defend the claim. Krumwiede v. Brighton Assocs., L.L.C., No. 05-C-3003, 2006 WL 1308629, at *10 (N.D. Ill. May 8, 2006). When spoliation substantially denies a party the ability to support or defend the claim OR delays production of evidence. Jones v. Bremen High Sch. Dist. 228, No. 08-C-3548, 2010 WL 2106640, at *8-9 (N.D. Ill. May 25, 2010).	Grossly negligent conduct; jury instruction to inform the jury of the defendant's duty and breach thereof. Jones v. Bremen High Sch. Dist. 228, No. 08-C-3548, 2010 WL 2106640, at *10 (N.D. Ill. May 25, 2010).

Preservation (Sanctions)

E360 Insight, Inc. v. The Spamhaus Project, --- F.3d ----, 2011 WL 3966150 (7th Cir. September 02, 2011)

"With this track record, no reasonable person could conclude that the district court's sanctions were too severe. *See Johnson, 192 F.3d at 661; see also Johnson v. J.B. Hunt Transport, Inc.*, 280 F.3d 1125, 1132 (7th Cir.2002) (affirming imposition of harsh sanctions in similar circumstances). The stricken witnesses and new damage calculation were disclosed to Spamhaus inexcusably late, and they were provided under circumstances that seriously call e360's good faith into doubt. The district court could have simply dismissed the case as a sanction for the failure to comply with orders and its bad faith misuse of the discovery process. *See Maynard*, 332 F.3d at 467. Instead, the court generously allowed e360 a chance to prove its damages using the information it had disclosed in a timely manner. In so doing, the district court imposed a punishment that was not excessive, *see Crown Life Ins. Co. v. Craig*, 995 F.2d 1376, 1382 (7th Cir.1993) (requiring that sanctions "be proportionate to the circumstances surrounding the failure[s] to comply with discovery"), and at the same time avoided the serious prejudice that Spamhaus would have suffered if it had been forced to conduct additional discovery to address e360's late disclosure of so much new information. The district court exercised its discretion with considerable restraint. We affirm the sanction in its entirety.

Preservation

Anatomy of a Case: *Jones v. Bremen High Sch. Dist. 228*, No. 08-C-3548, 2010 WL 2106640 (N.D. Ill. May 25, 2010).

Facts:

- Plaintiff filed her EEOC complaint in October 2007. She alleged that she endured discrimination based on race and disability.
- Defendant's initial response was to instruct three administrators to search through their own electronic mail and save relevant messages.
- No further guidance by counsel was given with respect to preservation.
- EEOC final decision was April 2008.
- Plaintiff filed lawsuit in June 2008; amended complaint in October 2008.
- Defendant's June 2008 response was to instruct three additional people to search through their own electronic mail and save relevant messages.

Preservation

Anatomy of a Case: *Jones v. Bremen High Sch. Dist. 228*, No. 08-C-3548, 2010 WL 2106640 (N.D. Ill. May 25, 2010).

Facts:

- In October 2008, defendant began automatically saving all emails from the district's users in a searchable archive.
- In the spring of 2009, the defendant instructed all of its employees to preserve emails which might be relevant to the litigation (plaintiff's first request for production was filed in May 2009).
- Defendant fired plaintiff on November 17, 2009, allegedly for turning over confidential student records to her attorneys, the subject of a motion for a protective order before the court.
- Plaintiff next filed a retaliation claim against defendant with the EEOC on November 30, 2009.
- She filed her Second Amended Complaint on January 5, 2010, adding a claim of retaliatory discharge to her racial discrimination claims in violation of Title VII.

Preservation

Anatomy of a Case: *Jones v. Bremen High Sch. Dist. 228*, No. 08-C-3548, 2010 WL 2106640 (N.D. Ill. May 25, 2010).

The legal test:

- "To find that sanctions for spoliation are appropriate, the Court must find the following: 1) that there was a duty to preserve the specific documents and/or evidence, 2) that the duty was breached, 3) that the other party was harmed by the breach, and 4) that the breach was caused by the breaching party's willfulness, bad faith, or fault."

- "If the Court finds that sanctions are appropriate, it must determine whether the proposed sanction can ameliorate the prejudice that arose from the breach; if a lesser sanction can accomplish the same goal, the Court must award the lesser sanction."

Preservation

Anatomy of a Case: *Jones v. Bremen High Sch. Dist. 228*, No. 08-C-3548, 2010 WL 2106640 (N.D. Ill. May 25, 2010).

Factor 1:

"First, a party has a duty to preserve evidence that it has control over and which it reasonably knows or can foresee would be material (and thus relevant) to a potential legal action. A document is potentially relevant, and thus must be preserved for discovery, if there is a possibility that the information therein is relevant to any of the claims. The existence of a duty to preserve evidence does not depend on a court order. Instead, it arises when a reasonable party would anticipate litigation."

(Footnotes omitted.)

Preservation

Anatomy of a Case: *Jones v. Bremen High Sch. Dist. 228*, No. 08-C-3548, 2010 WL 2106640 (N.D. Ill. May 25, 2010).

Factor 2:

"Second, the duty to preserve evidence must have been breached. In the Northern District of Illinois, a party's failure to issue a litigation hold is not per se evidence that the party breached its duty to preserve evidence. Instead, reasonableness is the key to determining whether or not a party breached its duty to preserve evidence. It may be reasonable for a party to not stop or alter automatic electronic document management routines when the party is first notified of the possibility of a suit. However, parties must take positive action to preserve material evidence."

(Footnotes omitted.)

Preservation

Anatomy of a Case: *Jones v. Bremen High Sch. Dist. 228*, No. 08-C-3548, 2010 WL 2106640 (N.D. Ill. May 25, 2010).

Factor 3:

"Third, the breach must have harmed the other party and, fourth, there must be a sufficient level of fault to warrant sanctions. Findings of willfulness, bad faith, and fault are all sufficient grounds for sanctions. However, a court may only grant an adverse inference sanction upon a showing of bad faith. Bad faith requires the intent to hide unfavorable information. This intent may be inferred if a document's destruction violates regulations (with the exception of EEOC record regulations). Fault is defined not by the party's intent, but by the reasonableness of the party's conduct. It may include gross negligence of the duty to preserve material evidence. Mere negligence is not enough for a factfinder to draw a negative inference based on document destruction."

(Footnotes omitted.)

Preservation

Anatomy of a Case: *Jones v. Bremen High Sch. Dist. 228*, No. 08-C-3548, 2010 WL 2106640 (N.D. Ill. May 25, 2010).

Factor 4:

"The final factor to determine the appropriateness of sanctions and the appropriate level of sanctions is whether the defendant acted willfully, acted in bad faith, or is merely at fault. To find bad faith, a court must determine that the party intended to withhold unfavorable information. Bad faith may be inferred when a party disposes of documents in violation of its own policies. Gross negligence of the duty to preserve material evidence is generally held to be fault.""

(Footnotes omitted.)

Preservation

Anatomy of a Case: *Jones v. Bremen High Sch. Dist. 228*, No. 08-C-3548, 2010 WL 2106640 (N.D. Ill. May 25, 2010).

The Findings:

- Defendant's attempts to preserve evidence were reckless and grossly negligent.
- Defendant did not reasonably prevent employees from destroying documents concerning this case.
- Defendant failed to adequately supervise those employees who were asked to preserve documents.
- Some relevant emails were probably lost due to this negligence.
- Tardy production of many more emails after depositions have been taken has caused her prejudice.
- Plaintiff did not demonstrate that defendant purposefully tried to destroy evidence material to her racial discrimination claim.

Preservation

Anatomy of a Case: *Jones v. Bremen High Sch. Dist. 228*, No. 08-C-3548, 2010 WL 2106640 (N.D. Ill. May 25, 2010).

The Sanctions:

"The Court has broad discretion to fashion an appropriate sanction to remedy plaintiff's prejudice. That sanction should be appropriate to the harm that has been done to plaintiff. Because the Court does not find that there was a deliberate effort to conceal harmful evidence, the Court will not find (as plaintiff urges) that an adverse inference be drawn against defendant (that email it did not preserve contained discriminatory statements). Such an inference, under these facts, would be contrary to established precedent and unfair to defendant. "

(Footnotes omitted.)

Preservation

Anatomy of a Case: *Jones v. Bremen High Sch. Dist. 228*, No. 08-C-3548, 2010 WL 2106640 (N.D. Ill. May 25, 2010).

The Sanctions:

"However, the Court will grant plaintiff the following sanctions: 1) the jury in this case should be told that the defendant had a duty to preserve all email concerning plaintiffs' allegations beginning in November 2007, but did not do so until October 2008. Accordingly, defendant will be precluded from arguing that the absence of discriminatory statements from this period (November 2007 until October 2008) is evidence that no such statements were made; 2) defendant will be assessed the costs and fees of plaintiff's preparation of the motion for sanctions; and 3) plaintiff will be permitted to depose witnesses concerning emails produced on May 14, 2010 if it so chooses. Defendant will pay for the cost of the court reporter for those depositions."

(Footnotes omitted.)

Preservation

- *Bryden v. Boys and Girls Club of Rockford*, 2011 WL 843907 (N.D. Ill. Mar. 8, 2011)
  - Plaintiff sought sanctions based on the Defendant's failure to preserve data (emails were admittedly lost during a third party's unacknowledged server upgrade). The Plaintiff argued that the data was destroyed willfully, however the Defendant argued that sufficient documentation has been provided, and that the remainder of what the Plaintiff sought was not relevant. While the Court established that the Defendant had a duty to preserve relevant documents, it could not perform an adequate balancing of the parties' interests due to the lack of explanation and speculative allegation and therefore dismissed the motion without prejudice.

Preservation

- *Jacobeit v. Rich Township High School District 227*, 2011 WL 2039588 (N.D. Ill. May 25, 2011)
  - Plaintiff sought sanctions under the Federal Rules as a result of the Defendant's untimely disclosure of documents, destruction of an audiotape and failure to preserve relevant emails. The Court found that the Plaintiff was prejudiced when he was unable to question witnesses about the tardily produced emails in their depositions and therefore granted leave to re-depose three witnesses. Regarding the destruction of the audiotape and relevant emails, the Court found that a duty to preserve was breached, and although the conduct did not amount to willfulness or bad faith, it did amount to "fault" and thereby awarded reasonable costs and fees incurred by the Plaintiff in filing his motions and reply brief. The Court also denied Plaintiff's request for forensic analysis of the Defendant's computers as the estimated monetary burden "greatly outweighs the minimal likelihood that it would reveal additional relevant evidence."

Preservation

- *Oleksy v. General Electric*, 2011 WL 3471016 (N.D. Ill. August 8, 2011)
  - Plaintiff sought to compel additional discovery including documentation related to the Defendant's document hold practices after it was discovered that a regularly-scheduled data purge of a database had deleted potentially relevant data. The Court found that the Defendant was at fault for the purge and that its culpability reflected "more than mere inadvertence or carelessness" as they were obligated to ensure the data was preserved yet a litigation hold letter had not been sent to the database manager.

Preservation

- *SEC v. Brewer*, 2011 WL 3584800 (N.D. Ill. August 15, 2011)
  - The Court found the Defendants in contempt for failing to preserve documents as previously ordered and determined that the appropriate sanction included costs associated with the government having to bring and prosecute the motion to compel. While it was undisputed that ESI had been destroyed, the Defendants' attempted to argue that documents could be easily obtained from other sources to which the Court pointed out: the burden was on them, not the Government to comply with the agreed order.

Preservation

Seventh Circuit Principle 2.04 (Scope of Preservation)

(a) Every party to litigation and its counsel are responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control. Determining which steps are reasonable and proportionate in particular litigation is a fact specific inquiry that will vary from case to case. The parties and counsel should address preservation issues at the outset of a case, and should continue to address them as the case progresses and their understanding of the issues and the facts improves.

(b) Discovery concerning the preservation and collection efforts of another party may be appropriate but, if used unadvisedly, can also contribute to the unnecessary expense and delay and may inappropriately implicate work product and attorney-client privileged matter. Accordingly, prior to initiating such discovery a party shall confer with the party from whom the information is sought concerning: (i) the specific need for such discovery, including its relevance to issues likely to arise in the litigation; and (ii) the suitability of alternative means for obtaining the information. Nothing herein exempts deponents on merits issues from answering questions concerning the preservation and collection of their documents, ESI, and tangible things.

Preservation

Seventh Circuit Principle 2.04 (Scope of Preservation)

(c) The parties and counsel should come to the meet and confer conference prepared to discuss the claims and defenses in the case including specific issues, time frame, potential damages, and targeted discovery that each anticipates requesting. In addition, the parties and counsel should be prepared to discuss reasonably foreseeable preservation issues that relate directly to the information that the other party is seeking. The parties and counsel need not raise every conceivable issue that may arise concerning its preservation efforts; however, the identification of any such preservation issues should be specific.

Preservation

Seventh Circuit Principle 2.04 (Scope of Preservation)

(d) The following categories of ESI generally are not discoverable in most cases, and if any party intends to request the preservation or production of these categories, then that intention should be discussed at the meet and confer or as soon thereafter as practicable:

(1) "deleted," "slack," "fragmented," or "unallocated" data on hard drives;

(2) random access memory (RAM) or other ephemeral data;

(3) on-line access data such as temporary internet files, history, cache, cookies, etc.;

(4) data in metadata fields that are frequently updated automatically, such as last-opened dates;

(5) backup data that is substantially duplicative of data that is more accessible elsewhere; and

(6) other forms of ESI whose preservation requires extraordinary affirmative measures that are not utilized in the ordinary course of business.

Preservation

Seventh Circuit Principle 2.04 (Scope of Preservation)

(e) If there is a dispute concerning the scope of a party's preservation efforts, the parties or their counsel must meet and confer and fully explain their reasons for believing that additional efforts are, or are not, reasonable and proportionate, pursuant to Rule 26(b)(2)(C). If the parties are unable to resolve a preservation issue, then the issue should be raised promptly with the Court.

Preservation

Fed. R. Civ. P. 26(f)(2) Conference Content; Parties' Responsibilities.

In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); **discuss any issues about preserving discoverable information**; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(Emphasis added.)

Preservation

- How should one plan for the possibility of being subject to eDiscovery?
- How best to respond to a letter from an attorney demanding that electronic data be preserved either before or after a lawsuit is filed? What if you are a third party to the litigation?
- When should a party voluntarily disclose its preservation efforts?
- Do I have to issue a written legal hold in every case?
- Can you still permanently delete non-relevant electronic data and still have a qualitative preservation system that will not result in sanctions?

Preservation

- What is the proper policy for management and/or deletion of email communications in the ordinary course of business?
- How can I help my client convince her in-house privacy officer that litigation preservation obligations trump data privacy considerations?
- Do counsel representing individual plaintiffs need to worry about preservation issues?
- What is the relationship between the public records act and preservation?
- Is it sufficient for the purposes of preservation to print and preserve a copy of computer-generated reports, or is it actually necessary to preserve the electronic file in order to comply with the preservation obligations?

Preservation

- Seventh Circuit Electronic Discovery Pilot Program (Oct. 2009)
- The Sedona Conference® Commentary on Legal Holds – September, 2010
- The Sedona Conference® Commentary on Inactive Information Sources (July 2009)
- The Sedona Conference® Commentary on Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible (August 2008)
- The Sedona Conference® Commentary on Email Management (August 2007)

Privilege

Elements of Attorney-Client Privilege

- A communication
- Between attorney and client
  - No third parties
  - Attorney must be acting as an attorney
  - Person or entity asserting the privilege must be the client
- In confidence
- For the purpose of obtaining or providing legal advice

Privilege

- Attorney Work Product Doctrine Applies to:
  - Documents and tangible things
  - Prepared in anticipation of litigation or for trial
  - Prepared by or for a party or its representative (by an attorney, client or consultant, etc.)

- Qualified Immunity Only
  - May be discovered based on substantial need *and* inability to obtain information by other means without undue hardship
  - Opinion work product more protected than fact work product

Privilege

How to Claim Privilege in Litigation:

- Privilege logs governed by Fed. R. Civ. P. 26(b)(5)

  (A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

  (i) expressly make the claim; and

  (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

- The 1993 Advisory Committee Note that accompanied the Rule declined to identify exactly what information needed to be provided, suggesting that:

  "[d]etails concerning time, persons, general subject matter etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories."

- *Muro v. Target Corp.*, 250 F.R.D. 350 (N.D. Ill. 2007)(Rule 26(b)(5)(A) does not require itemizing each item individually on the privilege log; "Rule 26(b)(5)(A) requires only that a party provide sufficient information for an opposing party to evaluate the applicability of privilege, 'without revealing information itself privileged.'")

Privilege

Waivers:

- Unintentional Waiver
  - Inadvertent disclosure

- Intentional Waiver
  - Waiver as part of litigation strategy (*e.g.*, to prove internal processes)
  - Other conduct (*e.g.*, disclosure to third parties)

- Sanction
- Scope of Waivers
- Crime Fraud Exception
- Difference Between Jurisdictions

Privilege

Fed. R. Evid. 502(a):

- When a disclosure is made in a federal proceeding, the waiver does not extend to undisclosed information or communications unless: (1) the waiver is intentional; (2) the disclosed and undisclosed communications relate to the same subject matter; and (3) the communications "ought in fairness" be disclosed together.
- Thus, subject matter waiver cannot result from an inadvertent production, and does not automatically result even after a voluntary production.
- "[S]ubject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver." Fed. R. Evid. 502(a) 2008 Advisory Committee Note.
- While certain jurisdictions have applied this or a similar standard, Rule 502 creates the first national standard for subject matter waiver, so long as the initial triggering disclosure occurs in a federal court.

Privilege

Fed. R. Evid. 502(b):

- Rule 502(b) protects a party from waiving a privilege in a federal or state proceeding if privileged or protected information is disclosed inadvertently in a federal court proceeding or to a federal public office or agency, unless the disclosing party was negligent in producing the information or failed to take reasonable steps seeking its return.
- This was the "middle ground" approach under prior case law, although some jurisdictions have taken either a more or less restrictive approach.
- The Advisory Committee Note discusses some considerations that will affect the reasonableness of a party's actions to prevent disclosure, beyond those in the text of the rule.

Privilege

Fed. R. Evid. 502(b):

- Additional factors include the number of documents to be reviewed, and the time constraints for production. Further, the presence of an established records management system before litigation may be relevant, and depending on the circumstances, the use of advanced analytical software applications and linguistic tools in screening for privilege and work product may support a finding that a party took "reasonable steps" to prevent inadvertent disclosure.
- The Note adds that the rule "does not explicitly codify" the waiver test, because "it is really a set of non-determinative guidelines that vary from case to case."

Privilege

Fed. R. Evid. 502(c):

- Addresses the reverse of subdivisions (a) and (b) – the effect of a state court waiver on a later federal court proceeding.
- Provision holds that a disclosure made in a state proceeding does not constitute a waiver in federal court so long as the disclosure:
  - would not have been a waiver under Rule 502 if it had been made in a federal proceeding; and
  - is not a waiver of the law of the state where the disclosure occurred.
- Provision only applies to disclosures that are not the subject of a state court order concerning waiver.
- Like the earlier provisions regarding subject matter waiver and inadvertent production related to disclosure in federal court, this provision seeks to create consistency between state and federal courts.

Privilege

Fed. R. Evid. 502(d):

- Rule 502(d) provides that "[a] federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court – in which event the disclosure is also not a waiver in any other federal or state proceeding."
- Specifically permits a federal court to enter an order preventing disclosure of privileged or protected information from constituting a waiver in that court or in any other court. Although such an order may arise from a party agreement, the court may also issue such an order on its own.
- Under this provision, a court may incorporate party agreements into an order, including a quick peek agreement or a clawback agreement.
- On its face this provision does not require reasonable care, or any standard of care at all, to make such agreements enforceable in other jurisdictions, so long as the agreement is memorialized in an order. Indeed, the Advisory Committee Note says specifically that "the court order may provide for return of documents **irrespective of the care taken by the disclosing party**; the rule contemplates enforcement of 'clawback' and 'quick peek' arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product."
  (Emphasis added.)

Privilege

Fed. R. Evid. 502(d):

- Theoretically, under this section, the parties could agree to virtually abandon the privilege review process altogether, or agree to terms that clearly are not likely to address the relevant privilege issues. If the agreement is then blessed by the court, any disclosure made under that agreement would not be a waiver in any federal or state court, even if the disclosure would not have met the requirements for protection under the inadvertent disclosure provisions of 502(b).
- Rule 502's language on its face is silent as to whether party consent is necessary for such an order to be entered; however, the Advisory Committee Note states unequivocally that party consent is not necessary: "Under the rule, a confidentiality order is enforceable whether or not it memorializes an agreement among the parties to the litigation. Party agreement should not be a condition of enforceability of a federal court's order."

Privilege

Fed. R. Evid. 502(e):

- Rule 502(e) acknowledges that parties in a federal proceeding may enter an agreement providing for mutual protection against waiver in that proceeding, but provides that such an agreement is only binding on the signing parties, unless the agreement is incorporated into a court order.
- This was not new law, but merely codification of common law permitting such agreements between parties -- while clarifying that such an agreement does not bind third parties without a court order.
- **Parties seeking the protection of Rule 502(d) must get their agreements entered by the court.**
- Fed. R. Evid. 502(e) 2008 Advisory Committee Note (the subdivision codifies "the well-established proposition that parties can enter an agreement to limit the effect of waiver by disclosure").

Privilege

- Given the volume of data collected and produced in litigation how do I manage the risk that privileged information may be produced?
- How do I write an effective/enforceable FRE 502 agreement and order?
- Do you ever recommend entertaining the idea of allowing the opposing side a "quick peek?" If so, in what sort of circumstances?
- Is it wise to seek, and how do you best pursue, confidentiality agreements to allow information disclosure while preserving privacy and privilege?

Privilege

- How can I reduce the costs of attorney privilege review and the creation of privilege logs?
- Have any Courts adopted the Facciola/Redgrave approach?
- Thoughts on how to manage the costs/burdens of handling the identification of emails on privilege logs?
- What are the necessary elements for the formation of a joint defense agreement/privilege?

Privilege

- *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework* (Federal Court Law Review, Volume 4, Issue 1 (2009) (Jonathan M. Redgrave with Hon. John M. Facciola)

- *New Federal Rule of Evidence 502: Privileges, Obligations, and Opportunities* (56 The Federal Lawyer 1, January 2009) (Jonathan Redgrave and Jennifer J. Kehoe)

Privilege

- *Testimonial Privileges (*David Greenwald, Edward F. Malone, Robert R. Stauffer)(Thompson West, 3d ed., 2005)(update 2010)

- Federal Evidence Review http://federalevidence.com/resources502

Privacy

- Privacy rights under US law
  - Federal laws (e.g., HIPPA)
  - State laws
- Privacy rights under foreign laws
  - EU Data Protection Directive
  - Canada
  - Mexico
- Role of U.S. courts to protect privacy interests
  - Rule 26(b)(2)(C) limitations on discovery
  - And…

Privacy

- Rule 26(c) Protective Orders.

(1) In General.

A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending — or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. **The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression**, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) Ordering Discovery.

If a motion for a protective order is wholly or partly denied, the court may, **on just terms**, order that any party or person provide or permit discovery.

(Emphasis added.)

Privacy

- *Muick v. Glenayre Electronics*, 280 F.3d 741, 743 (7th Cir. 2002)("[Plaintiff] had no right of privacy in the computer that [his employer] had lent him for use in the workplace. Not that there can't be a right of privacy . . . in employer-owned equipment furnished to an employee for use in his place of employment. . . . But [the employer] had announced that it could inspect the laptops that it furnished for the use of its employees, and this destroyed any reasonable expectation of privacy. . . . The laptops were [the employer's] property and it could attach whatever conditions to their use it wanted to. They didn't have to be reasonable conditions. . . .")

- *Shefts v. Petrakis*, 2010 WL 5125739, at **8-9 (C.D. Ill. Dec. 8, 2010)(court found that plaintiff had no reasonable expectation of privacy in communications sent via Blackberry handheld device, employer email account, and Yahoo! email account because employer had policy in place regarding monitoring of such communications, stating that the Seventh Circuit has held "a party's expectation of privacy in messages sent and received on company equipment or over a company network hinge on a variety of factors, including whether or not the company has an applicable policy on point.")

- *Stengart v. Loving Care Agency, Inc.*, 973 A.2d 390, 399 (N.J. Super. Ct. App. Div. 2009)(rejecting argument that employer could access Web-based email account of employee because the employee used a company computer to access the email account)

Privacy

- *United State v. Barrows*, 481 F.3d 1246, 1248-49 (10th Cir. 2007)(holding that employee had no reasonable expectation of privacy in personally owned computer because employee brought it to work and used it for work functions on a non-password protected file-sharing network)

- *Biby v. Bd. of Regents*, 419 F.3d 845, 850-51 (8th Cir. 2005)(holding that employee had no expectation of privacy in computer files when employer had a policy that allowed it to search files in responding to a request for discovery)

- *Smyth v. Pillsbury Co.*, 914 F. Supp. 97, 101 (E.D. Pa. 1996)(holding that employee loses reasonable expectation of privacy in email once employee sends email over a company email system)

- *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650, 655-657 (N.Y. Sup. Ct. 2010)("Indeed, as neither Facebook nor MySpace guarantee complete privacy, Plaintiff has no legitimate reasonable expectation of privacy. . . . Thus, when Plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings. Indeed, that is the very nature and purpose of these social networking sites else they would cease to exist. Since Plaintiff knew that her information may become publicly available, she cannot now claim that she had a reasonable expectation of privacy. . . . Further, Defendant's need for access to the information outweighs any privacy concerns that may be voiced by Plaintiff.")

Privacy

- Is there any right of privacy to a person's social networking information?
- Does US discovery always trump foreign data privacy laws?
- Are private emails or texts sent on company owned devices protected or not?
- How does cloud computing affect privacy rights?
- Does a litigant lose privacy rights by virtue of being part of a law suit?

Privacy

- International Association of Privacy Professionals (www.privacyassociation.org)
- The Sedona Conference Working Group 2 & Working Group 6
- Gucci Amer., Inc. v. Curveal Fashion, 2010 WL 808639 (S.D.N.Y. Mar. 8, 2010)

  (Plaintiff sought to compel the production of documents and information regarding defendants' Malaysian bank accounts pursuant to a subpoena served on United Overseas Bank's New York Agency ("UOB NY"). UOB NY was not a party to the underlying action, nor was its parent company. Despite substantial evidence that production of the requested information was prohibited by Malaysian law and that violation of the law could subject a person to civil and criminal penalties, court concluded that compliance with the subpoena was warranted and ordered UOB NY to produce the information within two weeks.)

Privacy

- AccessData Corp. v. ALSTE Tech. GMBH, 2010 WL 318477 (D. Utah Jan. 21, 2010)

  (Court granted plaintiff's motion to compel and ordered defendant (a German company) to produce responsive third-party, personal data, despite objections that such production would violate German law.)

- EEOC v. Simply Storage Mgmt., LLC, 270 F.R.D. 430 (S.D. Ind. May 11, 2010)

  (EEOC, on behalf of two claimants, filed claims alleging sexual harassment. In the course of discovery, defendant sought production of claimants' internet social networking site profiles and other communications from claimants' Facebook and MySpace.com accounts. Court determined that certain content was relevant and ordered plaintiff to produce the relevant information, subject to the guidelines identified by the court.)

Q&A

- How do you deal with a party that is not sophisticated in eDiscovery issues? E.g., pro se plaintiff or attorney with no experience/understanding?
- How will the cloud affect eDiscovery and the litigation practice in general?
- Whether search for email or other ESI in handheld device memory is required for items not regularly stored in a dedicated private server – e.g. where a witness' email account is with yahoo, Gmail?
- Discovery of emails, including identification of custodians and best practices for limiting this often onerous task.
- To what extent do you find Magistrates, supervising discovery, saying "no" to a party seeking to increase the scope of electronic discovery after the initial reviews of ESI produced pursuant to…
- How are these Ps affected/modified when the discovery target is a foreign non-party? Or does the same analysis apply?

Q&A

- How to ensure that your opponent is producing all relevant information and not holding out one or more strings of bad emails or memos?
- What meet and confer requirements is there concerning selection of ESI search terms? What ESI search terms are typically considered overbroad or unduly burdensome?
- In a contested hearing, my opponent submitted an affidavit from a computer technologist that 2 days after email is deleted its gone forever. Neither the judge nor I believe him.
- What obligations do clients have to re-do/re-evaluate eDiscovery steps previously taken in ongoing litigation to bring them into compliance with eDiscovery obligations that post-date the litigation.

7. February 28, 2011 and April 11, 2011
"The Seventh Circuit E-Discovery Pilot Program:
Principles and Practical Applications"

Discovery Pilot
Seventh Circuit Electronic Discovery Pilot Program

February 28, 2011
Milwaukee, Wisconsin

The Seventh Circuit E-Discovery Pilot Program: Principles and Practical Applications

Chief District Judge Charles Clevert, Jr.
Magistrate Judge Nan Nolan
Tim Edwards, Axley Brynelson LLP
Jim McKeown, Foley & Lardner LLP
Rich Moriarty, Assistant Attorney General, Wisconsin

Co-Sponsored with Eastern District of Wisconsin Bar Association

Discovery Pilot
Seventh Circuit Electronic Discovery Pilot Program

April 11, 2011
Madison, Wisconsin

The Seventh Circuit E-Discovery Pilot Program: Principles and Practical Applications

Magistrate Judge Stephen Crocker
Magistrate Judge Nan Nolan
Tim Edwards, Axley Brynelson LLP
Jim McKeown, Foley & Lardner LLP
Rich Moriarty, Assistant Attorney General, Wisconsin

Co-Sponsored with Western District of Wisconsin Bar Association

8. September 8, 2011
"Mock Rule 16 Meet and Confer"

Mock "Meet & Confer" Conference Videotape Production

September 8, 2011

A G E N D A

[Draft Version 2: 9/5/11]

Cast (in order of appearance):
Bob Williams (RFW)
Ken Withers (KJW)
Mary Rowland (MMR)
Tom Lidbury (TAL)
Craig Ball (CDB)
John Jessen (JHJ)
Judge Scheindlin (SAS)

TIME	LEADER	SPEAKING POINTS
9:20	RFW	Opening remarks (before the camera roll) to provide short history of this event, acknowledge the co-sponsors, and offer special thanks to Judges Nolan and Holderman. Note that some judges attending may need to "come and go" in the course of the event. Provide logistical information. Introduce Ken Withers.
9:30	KJW	Provide fact background on scenario and introductions of other players.
9:35	MMR	Plaintiff requests the defendant preserve "all"

		of Global's records related to environmental monitoring, cleanup, and hazardous waste disposition.
9:36	TAL	Defendant explains what they have that they consider relevant, the enterprise-based preservation steps they have already taken, and the preservation steps they plan to take on a going-forward basis. Global's position is that this will satisfy substantially all of Global's preservation obligations for active data.
9:38	MMR	Plaintiff asks about the preservation and production of ESI from key custodians' local hard drives and media, beyond what is found on enterprise servers.
9:39	TAL	Counsel, with the assistance of their respective experts, agree that these must be preserved, but will not be searched unless it is determined that the network shares and server mail sources are substantially incomplete. The method agreed upon to make this determination is that local machines and media (desktops, laptops, external and portable storage devices) of three mutually agreed-upon key custodians will be collected and their substantive content compared to those custodians' network shares. If this comparison demonstrates that the relevant content on network shares is fairly reflective

		of the relevant content from the other media, then further searches will be generally confined to custodians' network shares and e-mail. If there is a significant relevant disparity, then other sources must be collected and searched.
9:44	TAL	Defendant requests that City preserve "all" its cleanup records and expressed some uncertainty about what City has done or intends to do to preserve records from disparate sources so far.
9:45	MMR	City explains its custodian-based preservation and collection efforts.
9:46	MMR	Plaintiff requests that Global preserve all of Bugacide's 3,000+ backup tapes.
9:47	TAL	Defendant will preserve them "in place," but considers them to be "not reasonably accessible" and therefore outside the scope of discovery because of the cost of restoring them and searching them for relevant data. Defendant describes the problems in detail (based on agreed-upon background facts).
9:49	MMR	Plaintiff makes its case for relevance and uniqueness of ESI from the legacy backup tapes, and intends to request that the collection be restored in its entirety and subject to discovery.
9:51	JHJ/ CDB	After brief side conversations with their respective counsel, experts for both plaintiff

		and defendant negotiate a resolution the backup tape methodology. The gist of the solution is that the parties ultimately agree that four sets of tape ("sets" being full backup events, not individual tapes from sets) from the legacy e-mail and file server collections will be searched. Three of the sets will be the earliest complete set, the latest complete set, and one complete set at the halfway point temporally. The fourth set will be of the plaintiff's selection from within the other complete full backup sets. As these tape sets are in forms that cannot be restored by the company, they will be sent out for processing. Costs will be borne by defendant. In consideration of this agreement, the plaintiff will suspend (without prejudice) its demand that the entire collection of legacy mainframe tapes be processed. The unlabelled tapes of uncertain origin will be made available to the experts from both sides who will jointly settle upon a means to assess their content without undue expense (e.g., by sampling, serial number correlation to dates, etc.).
9:55	TAL	Further request for material from e-mail and file server backup tapes are not foreclosed; however good cause must be shown, based on the extraction of relevant and material

		content from the samples.
9:56	TAL	Moving on to production itself, the defendant wants the plaintiffs to propose keywords to be searched once, and then employ predictive coding (concept search tools) to determine responsiveness and privilege.
9:57	MMR	The plaintiffs want the defendant to be solely responsible for framing searches that will find responsive ESI and demands that lawyers review the material for relevance and privilege.
9:58	JHJ	Defendant's expert makes case for utilizing technology for review.
10:00	CDB	Plaintiff's expert insists that if word searching be employed, that the process be iterative.
10:02	MMR	Plaintiff counsel summarizes the positions of both sides and proposes that this be presented to the Court for resolution.
10:04	TAL	How does City plan to produce its property records?
10:05	MMR	These will produced as kept in usual course (with identical search capabilities). To the extent they've been digitized, either a dedicated terminal at the records office or a complimentary remote access account for exclusive use in the litigation will be made available.
10:06	TAL	This may the how they are kept in the usual

		course of business, but this is not a "reasonable useable" production for the purposes of this litigation. The defendant won't be looking up individual property records, but performing analysis on the records in aggregate. The defendant needs the data, not just access to the database.
10:07	MMR	[after brief discussion with expert] Plaintiff will make arrangements to provide the data in a form useable by the defendant's expert.
10:08	MMR	And while we're at it, the plaintiffs want all of the defendant's production in native format.
10:09	TAL	The Defendant plans to initially produce .tiff images of all ESI, because that is how they have already been collected and entered into the defendant's litigation support system. Defendant will consider requests, supported by good cause, to produce particular documents (spreadsheets, Excel databases, etc.) identified by the plaintiffs from the .tiff collection, at a later stage of discovery.
10:10	MMR/ CDB	Tiff images are not "reasonably useable" as a form of production. Plaintiffs require the native form and metadata in electronic form to make the ESI searchable.
10:12	TAL/ JHJ	The defendant has already collected and organized its ESI with a .tiff production in mind. Email, in particular, is processed by

		extracting the messages from the email system and converting them into .tiff, which is the industry standard and is the way defendant has conducted litigation for ten years. Re-collecting that data in a different form, and particularly collecting all the associated metadata, would be costly and redundant, and plaintiff has not demonstrated any need.
10:14	MMR	[Summarizes the positions of the parties and proposes that this question be presented to the court at the Rule 16 conference.]
10:15	TAL	It has come to defendant's knowledge that many of the class members, individual plaintiffs, and City employees are active users of social media, and Facebook in particular, and the defendant intends to request that these plaintiffs and city employees preserve and produce their Facebook pages.
10:16	MMR	This is highly irregular, irrelevant, immaterial, burdensome, and a gross violation of privacy, and just what does defendant expect to gain by pursuing such discovery?
10:17	TAL	Defendant explains the basis for the request for Facebook pages and requests that Plaintiff counsel, as liaison counsel for the Plaintiffs, guarantee that the Plaintiffs will

		preserve and produce their Facebook pages. The way to do that is to have each plaintiff required to "friend" the defendant, allowing the defendant full access to each plaintiff's page.
10:19	MMR/ CDB	[Plaintiff counsel consults privately with expert about feasibility of Facebook preservation.]
10:21	MMR	Plaintiff liaison counsel will agree to send a preservation memo to fellow attorneys with instructions on how their clients can preserve their Facebook pages, but cannot personally undertake preservation obligations on behalf of the plaintiffs, especially for non-clients, and is in no position to require individual plaintiffs to "friend" the defendant.
10:23	TAL	[Summarizes the positions of the parties and proposes that this question be presented to the court at the Rule 16 conference.]
10:24	MMR	The plaintiffs understand that the defendant maintains a database of information derived from environmental monitors at various locations around the former Bugacide facility, and would like production of that database.
10:25	TAL	The database is dynamic and the data is ephemeral. It acts as an alarm system, and only rare incidents exceeding certain thresholds trigger reports, which are saved. The plaintiffs may have the reports. Preservation of the database itself would

		require reprogramming, quickly become unmanageable, and serve no purpose.
10:27	CDB/ JHJ	Experts briefly discuss alternatives and state that they will meet before the Rule 16 conference to work up a solution.
10:29	MMR/ TAL	Counsel agree to exchange drafts of joint report on this conference for submission to the Court prior to the Rule 16 conference before Judge Scheindlin.
10:30		BREAK to rearrange cameras for full-courtroom coverage
10:40	KJW	[Introductions and convening of court]
10:43	SAS	Opening comments complementing counsel on their Rule 26(f) conference report and high degree of cooperation exhibited so far, and expressing confidence that with the Court's assistance, the remaining issues can be resolved. Issue One is the protocol for searching defendant's ESI. In conventional cases, this is entirely up to the responding party, in this case the defendant. But there seems to be some disagreement here. First let's hear from defendant counsel on what the defendant proposes to do. Mr. Lidbury?
10:45	TAL	[Defendant's position on search methodology]
10:48	SAS	[after some comments and questions] That seems very reasonable, Mr. Lidbury. Ms. Rowland, what are the plaintiffs' objections to this approach?

10:49	MMR	[Plaintiffs' position on search methodology]
10:52	SAS	[Court proposes that the parties work out a way to generate search terms and test them, but the Court may wish to compel an iterative process using sampling, allow predictive search in lieu of privilege review, and protect the process with a FRE 502(d) order.]
10:55	SAS	The next issue we need to take up is the plaintiff's request for the environmental incident monitoring database. Ms. Rowland, could you explain what it is you want?
10:56	MMR	[Plaintiff's position on database discovery]
10:58	SAS	Mr. Lidbury, the request appears to be highly relevant. What are your objections?
10:59	TAL	[Defendant's position on database discovery]
11:00	SAS	Ms. Rowland, do you really need all the data from this database to validate the reports Mr. Lidbury is offering? Could your environmental engineering expert validate the system with some samples or snapshots of the data?
11:01	MMR	[Plaintiffs' response]
11:03	SAS	[Court proposes that experts and environmental engineering consultants on both sides meet and confer to develop and acceptable plan for limited sampling of the data.]
11:05	SAS	The next issue is the forms in which ESI will be produced by the defendant, including

		metadata fields. Ms. Rowland, I understand that you intend to request that all metadata be produced in native form, is that correct?
11:06	MMR	[Plaintiffs' position on forms of production]
11:08	SAS	Mr. Lidbury, the defendant's position, as I understand it, is that you intend to produce .tiff images only, is that correct?
11:09	TAL	[Defendant's position of forms of production]
11:11	SAS	[Court orders defendant to produce text-based ESI as .tiff images with searchable text and agreed-upon fields of metadata, spreadsheets and database extracts in native form, and email as a searchable database.]
11:13	SAS	The final issue is the discovery of the individual plaintiff's Facebook pages. Mr. Lidbury, what is the relevance of this proposed discovery and exactly what are you asking the plaintiffs to do?
11:14	TAL	[Defendant's request for Facebook discovery]
11:16	SAS	I have to say, Mr. Lidbury, that while I see your point about the relevance of individual plaintiff's Facebook pages to the claims in this case, your proposed method of discovery is extraordinary. Mr. Rowland, what is the plaintiffs' position on this?
11:17	MMR	[Plaintiffs' opposition to "friending" proposal]
11:20	SAS	[Court will not order "friending" but require plaintiffs' liaison counsel to circulate written litigation hold notice to all plaintiff counsel

		alerting them to the Facebook preservation issue and providing instructions. Court also reminds counsel of their obligation to follow up on clients' preservation efforts.]
11:22	SAS	Closing remarks and summary of rulings.
11:25	KJW	Adjourns court and moderates questions from audience.
11:55	RFW	Closing remarks and thanks to all participants.

***In re* Bugacide Environmental Tort Litigation**

a/k/a/

City of Pleasantville, et al. v. Global Chemical Corp., CV 11-0001 (SAS)

Background Information

1. Several plaintiffs have filed suit against a manufacturers of pesticides for injuries alleged to have been caused by the defendant's disposal of toxic chemicals since 1980. Discovery proceedings have been consolidated under the supervision of Hon. Shira A. Scheindlin of Federal District Court. The parties met and conferred as required under Fed. R. Civ. P. 26(f) and submitted a joint report to the court indicating that they anticipate extensive discovery of electronically stored information. Judge Scheindlin has scheduled the first pretrial conference under Fed. R. Civ. P. 16 to discuss this aspect of the parties' discovery plans in more detail. She has requested that liaison counsel for the plaintiffs and counsel for the defendant both be present with their experts on electronically stored information.

2. The plaintiffs, predominately working class African American and Hispanic residents of Pleasantville, fled suit on January 3, 2011 against Global Chemical Corporation. The City of Pleasantville also filed suit that day against Global Chemical Corporation.

3. The defendant, Global Chemical Corporation (Global), is owner of Bugacide, a pesticide manufacturer that has operated a plant in Pleasantville since 1980.

4. Bugacide was not known for being a "good neighbor," and regularly dumped chemical waste from its manufacturing operations into unlined lagoons near a creek. It was also on the verge of bankruptcy after several years of mismanagement when it was bought by Global in January of 2007. Global immediately set out to clean up the operation, literally and figuratively, by modernizing the manufacturing, business, and environmental monitoring processes with state-of-the-art information technology.

5. The area where the facility is located is a poor minority community. The homes are of poor construction, some are mobile homes, and none are worth more than $45,000. The community is stable with relatively little turnover. There are two churches, a grade school, and two playgrounds in the community.

6. The individual plaintiffs include current and former homeowners, tenants, and residents of Pleasantville going back to 1980. They are divided into two groups, but all have filed claims based on nuisance, negligence, and strict liability.

   a. The first group ("Group A") consists of four personal injury plaintiffs, all of whom drank water from wells located down-gradient from the waste water lagoons beginning no earlier than 1980. Their injuries, with date of diagnosis, are lupus (1982), breast cancer (1996),

angiosarcoma of the liver (1999), and kidney cancer (2001). Investigations are continuing to identify additional plaintiffs with cancer or other serious health problems. These plaintiffs want monetary damages including punitive damages.

b. The second group ("Group B") consists of similarly-situated plaintiffs who live along the creek where the waste residue was dumped. They live anywhere from immediately adjacent to the property line of the defendant to three miles downstream, and all live within 1,000 yards of the creek. They used the creek for recreation and caught fish and crawdads from the creek for food. The creek would regularly flood, depositing material from the stream onto properties up tom 750 yards from the stream bed. These plaintiffs allege one or more of the following injuries:

- contamination present on their property consisting of material consistent with residue from the pesticide manufacturing activities
- a history of imprecise neurological problems such as headaches, dizziness, lack of concentration, and poor school performance
- a history of upper respiratory problems including asthma
- an increased risk of cancer and emotional upset about that risk, based on a report of a public health specialist.

7. The City of Pleasantville is suing for costs associated with cleaning up chemicals from public facilities in the area, providing medical serviced to residents at the municipal hospital, and providing special social services such as counseling and relocation assistance.

8. The City of Pleasantville is represented by experienced counsel from a well-established national law firm, who is also acting as liaison counsel for the plaintiffs in this consolidated discovery phase of the litigation. About half of the plaintiffs in Group B are represented by a large national class-action plaintiff firm. However, the other half of Group B, and all four plaintiffs in Group A, are represented by local attorneys in solo and small-firm practices, including a team of pro bono attorneys volunteering for a local environmental group.

9. Global is represented by a large national defense firm with which Global has had a 30-yeart relationship. This form is intimately familiar with Global's worldwide operations.

10. In their joint report to the court following the Rule 26(f) conference, counsel listed the following four points where they were not able to reach agreement, and on which they would like the court's assistance:

a. The parties have not reached an agreement on the preservation of electronically stored information potentially subject to discovery. The plaintiffs want all of Global's electronically stored information preserved through discovery, trial, and any possible appellate action. This includes not only historical material, but all data related to environmental monitoring and cleanup operations on an ongoing basis. Gobal states that this requests is overbroad and burdensome, and would require reprogramming of all the new IT systems to capture and

preserve cumulative information those systems were not initially designed to capture and preserve.

b. The plaintiffs want a commitment from the defendant that the defendant will search the nearly 3,000 disaster recovery backup tapes inherited by Global when they acquired Bugacide for electronically stored information responsive to their anticipated document requests and interrogatories. Global has identified these backup tapes as data sources that are "not reasonably accessible:" under Rule 26, as they are not indexed or organized in any consistent or reliable manner, and were derived from IT systems that were retired when Global acquired Bugacide three years ago.

c. Of particular interest to the plaintiffs is Global's Emergency Management Voicemail System, on which all incidents that present potential safety or environmental hazard issues are reported by staff, which have taken this responsibility very seriously over the past three years and called in several thousand incidents, mostly routine. All the data on the system is kept as digital audio files, except for a file management system that records the time, date, duration of message, and source. Global states that follow-up documentation of all incidents of importance can be found elsewhere on the IT system, estimates the cost of transcribing the voice data as "astronomical," and requests that if the plaintiffs really want this, they should shoulder the transcription cost.

d. The defendant, for its part, plans to seek discovery from the City of Pleasantville of property records, medical records from the municipal hospital, and records of City cleanup efforts, all of which are in electronic form. However, the City states that the electronically stored information is scattered throughout various City agencies on stand-alone computers, small LANs, and held-held devices used by both City cleanup crews and medical personnel at the municipal hospital. The City states categorically that it is financially "broke" and cannot access and review all the electronically stored information that the defendant anticipates requesting.

Federal District Court
Civil Division

City of Pleasantville and John Smith, Jane Doe, et al.	)	
v.	)	CV 11-0001 (SAS)
Global Chemical Corporation and Bugacide Holdings Corporation	)	

Proposed Joint Discovery Plan and
Report Pursuant to Rule 16(f)

1. Counsel for the parties in the above-captioned action met and conferred on May 3, 2006 pursuant to Fed. R. Civ. P. 26(f) and hereby file this Joint Discovery Plan and Report.

2. The parties have exchanged initial disclosure of individuals likely to have discoverable information pursuant to Fed. R. Civ. P. 26(a)(1)(A) and have listed those individuals in a separate memorandum attached as Exhibit A.

3. The parties have exchanged initial disclosure by category and location of documents, electronically stored information, and tangible things pursuant to Fed. R. Civ. P. 26(a)(1)(B).

[...]

7. The parties have agreed to a list of factual issues relevant to the claims and defenses in this case and have set those out in a separate joint memorandum attached as Exhibit B.

8. The parties anticipate discovery of electronically stored information including e-mail, technical reports, word-processed document and databases from sources described as accessible by the Defendants in Exhibit C. The parties disagree on the need for discovery from two sources identified by the Defendants as not reasonably accessible because of undue cost and burden: (1) disaster recovery backup tapes and (2) the Emergency Management Voicemail System. Plaintiff City of Pleasantville has also objected to discovery from sources it describes as not reasonably accessible because of undue cost and burden in Exhibit D.

9. The parties have agreed to a proposed Protective Order which is attached as Exhibit E. The proposed Protective Order includes provisions consistent with Fed. R. Civ. P. 26(b)(5)(B) for the assertion of privilege after production of document and electronically stored information, for the return or

sequestering of such material by the receiving party pending determination of the privilege claim by the Court, and for limiting the distribution of discovery materials identified as Confidential by the producing party. The parties jointly request the Court endorsement and entry of the proposed Protective Order. The Parties also request the Court to issue an order under Fed. R. Evid. 502(d) providing that claims of attorney-client privilege or work product protection shall not be waived solely by disclosure in discovery under the Protective Order.

10. The parties have agreed to the production of all documents and electronically stored information in the form of .tiff images to be made available for inspection and copying by counsel, designated staff, consultants, and experts who have assented to the Protective Order at a secure document repository in the basement of the City of Pleasantville Public Library.

11. The parties anticipate completion of discovery of reasonably accessible documents, electronically stored information, and things by June 30, 2012.

12. Depositions of fact witnesses will begin on July 1, 2012 and be completed by December 31, 2012.

13. Depositions of environmental and medical experts will begin on January 1, 2013 and be completed by February 28, 2012.

14. The parties have agreed in principle to conduct discovery on the issues of accessibility noted in Paragraph 8 above through the exchange of special interrogatories and the taking of deposition of persons with knowledge of the parties' electronic information systems, and have agreed to a second meet-and-confer session to negotiate the details of this discovery within ten days of this Rule 16(b) Pretrial Scheduling Conference.

15. The parties have not reached agreement on the scope of any preservation agreement regarding electronically stored information. The Plaintiffs have requested that Defendant Global Chemical Corporation preserve all environmental monitoring information related to the Bugacide site and the surrounding City of Pleasantville being generated on an ongoing basis for the pendency of this litigation. The defendants object to this request as unduly costly and burdensome, and beyond the scope of the duty of preservation imposed by the common law.

[...]

Respectfully submitted this 26th day of August, 2011,

/s/ [counsel for all parties]

Editor's note: Attachments and exhibits referenced in this report have been deleted in the interest of brevity

E. Surveys Administered

E.1. Phase One

E.1.a. Judge Survey E-mail and Questionnaire

Electronic Discovery Pilot Program Survey

Judge James F. Holderman to: James_Holderman 02/16/2010 03:53 PM

Please respond to mdunn

History: This message has been forwarded.

Dear Jim:

Thank you for your participation in the Seventh Circuit Electronic Discovery Pilot Program. I am writing now to ask you to complete the Judge's Survey about the Pilot Program. This survey is important to the Pilot Program because it seeks information about your experiences with cases in the Program and will aid in determining the effectiveness of the Seventh Circuit's Principles Relating to Discovery of Electronically Stored Information ("the Principles").

Your responses to the survey are essential to the Program's success. Most of the 13 questions seek your thoughts about the usefulness of the Principles and ways to improve them. The results of this survey will be instrumental to the second phase of the Pilot Program and will be featured in presentations about the Program at the May 3, 2010 Seventh Circuit Bar Association Meeting and at the May 10, 2010 Judicial Conference of the United States, Advisory Committee on Civil Rules Conference in Durham, North Carolina.

Rest assured that all identifying information in connection with your responses to the survey is strictly confidential. Neither I, the Court, the Seventh Circuit Electronic Discovery Committee, nor any other judges or lawyers will have access to any identifying information.

To access the survey, please click on the following link:

http://vovici.com/l.dll/JGs94A572C8D9lhZD9U42992J.htm

When responding to the survey, please keep in mind the following Pilot Program case(s) on your docket:

Phoenix Bond v. Bridge et al, 05 C 4095

BCS Services v. Heartwood 88, Inc. et al, 07 C 1367

McDavid Knee Guard, Inc. et al v. Nike USA, Inc., 08 C 6584

National Processing Co. v. Richard B. Gillman, et al, 09 C 846

We need your responses to the survey as soon as you can provide them but, in any event, no later than by March 1, 2010. If you have any problems accessing the survey, please contact Dr. Meghan Dunn (mdunn@fjc.gov, 805-226-7497) of the Federal Judicial Center. If you have any substantive questions about the survey or the Pilot Program, please contact me or Magistrate Judge Nan Nolan.

Please accept my sincere gratitude and that of the Seventh Circuit Electronic Discovery Committee for your participation.

Thank you again.

Jim

Seventh Circuit Electronic Discovery Pilot Program

This is a survey about the Seventh Circuit's Electronic Discovery Pilot Program ("Pilot Program"). You are invited to participate because you are a judge presiding over one or more Pilot Program cases applying the Seventh Circuit's Principles Relating to Discovery of Electronically Stored Information ("Principles"). By answering this survey, you can provide valuable feedback on those procedures. **Please complete the survey by Monday, March 1, 2010.**

In this survey, we have taken care not to collect any information that could personally identify you or your Pilot Program cases. In addition, your individual answers will be kept strictly confidential. The results of the survey will be presented only in summary form (e.g., group averages). Participation is voluntary, but we encourage you to assist us in the Pilot Program. It is estimated that this survey will take less than 10 minutes to complete.

Your Pilot Program cases were identified to you in the email containing the survey link. To protect your identity, we will not ask you to specify those cases in the survey. However, please consider those cases when evaluating the efficacy of the Principles.

By clicking "Next Page", you agree to participate in the survey.

Next Page 20%

Seventh Circuit Electronic Discovery Pilot Program

In this survey, any discovery seeking information in electronic format will be referred to as "e-discovery". Electronically stored information will be referred to as "ESI".

1) NOT INCLUDING your Pilot Program cases, how many of your cases in the last five years involved e-discovery issues?

- ○ 0 cases
- ○ 1-2 cases
- ○ 3-5 cases
- ○ 6-10 cases
- ○ 11-20 cases
- ○ More than 20 cases

2) The Seventh Circuit's Principles for e-discovery were developed by a committee and are being tested in selected Pilot Program cases, including yours.

Please rate your familiarity with the substance of the Principles.

○ 0 Not At All Familiar ○ 1 ○ 2 ○ 3 ○ 4 ○ 5 Very Familiar

3) Your Pilot Program case type(s): (Please check all that apply to your pilot program cases.)

- ☐ Bankruptcy
- ☐ Civil Rights
- ☐ Contract
- ☐ Federal Tax
- ☐ Forfeiture/Penalty
- ☐ Employment/Labor/Employee Benefits
- ☐ Prisoner Petition
- ☐ Property Rights (copyright, patent, trademark)
- ☐ Real Property
- ☐ Social Security
- ☐ Torts (personal injury)
- ☐ Torts (personal property)
- ☐ Other (please specify)

If you selected other, please specify:

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United States District Court
NORTHERN DISTRICT OF ILLINOIS

Seventh Circuit Electronic Discovery Pilot Program

This survey is an evaluation of the Pilot Program Principles generally. If you had multiple Pilot Program cases, please consider them collectively rather than focus on any particular case.

4) Based on your observations at the initial status (FRCP 16(b)) conferences, please rate the extent to which the parties in your Pilot Program cases had conferred in advance on e-discovery issues (e.g., preservation, data accessibility, search methods, production formats, etc.).

○ N/A ○ 0 No Discussion ○ 1 ○ 2 ○ 3 ○ 4 ○ 5 Comprehensive Discussion

5) Did the proportionality standards set forth in FRCP 26(b)(2)(C) play a significant role in the development of discovery plans for your Pilot Program cases?

○ Yes
○ No
○ Not Applicable

6) Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the following:

	Greatly Increased	Increased	No Effect	Decreased	Greatly Decreased
Levels of cooperation exhibited by counsel to efficiently resolve the case	○	○	○	○	○
Likelihood of an agreement on procedures for handling inadvertent disclosure of privileged information or work product under FRE 502	○	○	○	○	○
Extent to which counsel meaningfully attempt to resolve discovery disputes before seeking court intervention	○	○	○	○	○
Promptness with which unresolved discovery disputes are brought to the court's attention	○	○	○	○	○
The parties' ability to obtain relevant documents	○	○	○	○	○
Number of allegations of spoliation or other sanctionable misconduct regarding the preservation or collection of ESI	○	○	○	○	○

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United States District Court
NORTHERN DISTRICT OF ILLINOIS

Seventh Circuit Electronic Discovery Pilot Program

7) Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or is likely to affect) the following:

	Greatly Increased	Increased	No Effect	Decreased	Greatly Decreased
Length of the discovery period	○	○	○	○	○
Length of the litigation	○	○	○	○	○
Number of discovery disputes brought before the court	○	○	○	○	○
Number of requests for discovery of another party's efforts to preserve or collect ESI	○	○	○	○	○
Counsel's ability to zealously represent the litigants	○	○	○	○	○

8) Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the following:

	Greatly Increased	Increased	No Effect	Decreased	Greatly Decreased
Counsel's demonstrated level of attention to the technologies affecting the discovery process	○	○	○	○	○
Your level of attention to the technologies affecting the discovery process	○	○	○	○	○
Counsel's demonstrated familiarity with their clients electronic data and data systems	○	○	○	○	○
Your understanding of the parties' electronic data and data systems for the appropriate resolution of disputes	○	○	○	○	○

9) Please indicate your level of agreement with the following statement, as it relates to your Pilot Program cases.

	Strongly Agree	Agree	Disagree	Strongly Disagree	Not Applicable
The involvement of e-discovery liaison(s) has contributed to a more efficient discovery process.	○	○	○	○	○

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United States District Court
NORTHERN DISTRICT OF ILLINOIS

Seventh Circuit Electronic Discovery Pilot Program

10) Do the Principles work better in some cases than in others?

- ○ Yes
- ○ No
- ○ Not Applicable

11) Please use the space below to explain why you believe the Principles had varying rates of success in different cases. What factors influenced their efficacy from case to case?

12) Which aspects of the Pilot Program Principles are the most useful?

13) How could the Pilot Program Principles be improved?

Thank you for completing the survey.

Previous Page | Submit Survey | 100%

E.1.b. Attorney Survey E-mail and Questionnaire

mdunn@fjc.gov
805.226.7497

----- Forwarded by Meghan Dunn/Research/FJC on 02/16/2010 01:23 PM -----

From: "Judge James F. Holderman" <James_Holderman@ilnd.uscourts.gov>
To: <mdunn@fjc.gov>
Date: 02/16/2010 01:21 PM
Subject: Electronic Discovery Pilot Program Survey

Thank you for your participation in the Seventh Circuit Electronic Discovery Pilot Program. Today I am writing to ask you to complete a 10-minute survey about the Pilot Program. The survey seeks information about your experiences with the Program and will aid in determining the effectiveness of the Seventh Circuit's Principles Relating to Discovery of Electronically Stored Information ("the Principles").

You have been selected for participation in this survey because you are listed as the lead counsel for one of the parties in the following case: Phoenix Bond & Indemnity Co. et al v. Bridge et al, 1:05-cv-04095.

We are asking that only one counsel per party respond for each case, and accordingly, request that either you or the lawyer on your team with the most knowledge of the ediscovery in the case respond to this survey by following the link below.

Your responses to the survey are essential to the program's success. The last few questions of the survey seek your thoughts about the usefulness of the Principals and ways to improve them. The results of this survey will be instrumental to the second phase of the Pilot Program and will be featured in presentations about the Program at the May 3, 2010 Seventh Circuit Bar Association Meeting and at the May 10, 2010 Judicial Conference of the United States, Advisory Committee on Civil Rules Conference in Durham, North Carolina.

Rest assured that all identifying information in connection with your responses to the survey is strictly confidential. Neither I, the Court, the Seventh Circuit Electronic Discovery Committee, nor any other judges or lawyers will have access to any identifying information.

To access the survey, please click on the following link:

http://vovici.com/l.dll/JGs94A594C6E8lcDY9U43315J.htm

We need you to complete the survey by March 1, 2010. If you have any problems accessing the survey or have other questions, please contact Dr. Meghan Dunn (mdunn@fjc.gov, 805-226-7497) of the Federal Judicial Center.

Please accept my sincere gratitude and that of the Seventh Circuit Electronic Discovery Committee for your participation.

Chief Judge James F. Holderman

United States District Court
NORTHERN DISTRICT OF ILLINOIS

Seventh Circuit Electronic Discovery Pilot Program

This is a survey about the Seventh Circuit's Electronic Discovery Pilot Program ("Pilot Program"). You are invited to participate because you are an attorney of record in a Pilot Program case applying the Seventh Circuit's Principles Relating to Discovery of Electronically Stored Information ("Principles"). By answering this survey, you can provide valuable feedback on those procedures. **Please complete the survey by Monday, March 1, 2010.**

In this survey, we have taken care not to collect any information that could personally identify you or your Pilot Program case. In addition, your individual answers will be kept strictly confidential. The results of the survey will be presented only in summary form (e.g., group averages). Participation is voluntary, but we encourage you to assist us in the Pilot Program. It is estimated that this survey will take less than 10 minutes to complete.

Your Pilot Program case was identified to you in the email containing the survey link. To protect your identity, we will not ask you to specify this case in the survey. However, your answers should reflect what has happened in that particular case. **If you are not familiar with the specifics of litigating that case, please forward the email containing the survey link to the most knowledgeable attorney on your legal team.**

By clicking "Next Page", you agree to participate in the survey.

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United States District Court
NORTHERN DISTRICT OF ILLINOIS

Seventh Circuit Electronic Discovery Pilot Program

1) Number of years you have practiced law, rounded to the nearest year:

years

2) Your main area of practice:

- ○ Bankruptcy
- ○ Civil Rights
- ○ Commercial Litigation -- class action
- ○ Commercial Litigation -- not primarily class action
- ○ Employment/Labor/Employee Benefits
- ○ Environmental
- ○ Estate planning
- ○ General Practice
- ○ Government
- ○ Intellectual Property
- ○ Personal Injury
- ○ Real Estate
- ○ Tax
- ○ Other (please specify)

If you selected other, please specify:

In this survey, any discovery seeking information in electronic format will be referred to as "e-discovery". Electronically stored information will be referred to as "ESI".

3) NOT INCLUDING your Pilot Program case, how many of your cases in the last five years involved e-discovery?

- ○ 0 cases
- ○ 1-2 cases
- ○ 3-5 cases
- ○ 6-10 cases
- ○ 11-20 cases
- ○ More than 20 cases

4) The Seventh Circuit's Principles for e-discovery were developed by a committee and are being tested in selected Pilot Program cases, including your Pilot Program case.

Please rate your familiarity with the substance of the Principles.

○ 0 Not At All Familiar ○ 1 ○ 2 ○ 3 ○ 4 ○ 5 Very Familiar

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United States District Court
NORTHERN DISTRICT OF ILLINOIS

Seventh Circuit Electronic Discovery Pilot Program

The following questions refer to your Pilot Program case. "FRCP" refers to the Federal Rules of Civil Procedure.

5) Case type:

- ○ Bankruptcy
- ○ Civil Rights
- ○ Contract
- ○ Federal Tax
- ○ Forfeiture/Penalty
- ○ Employment/Labor/Employee Benefits
- ○ Prisoner Petition
- ○ Property Rights (copyright, patent, trademark)
- ○ Real Property
- ○ Social Security
- ○ Torts (personal injury)
- ○ Torts (personal property)
- ○ Other (please specify)

If you selected other, please specify:

6) Party/parties you represent(ed):

- ○ Single plaintiff
- ○ Multiple plaintiffs
- ○ Single defendant
- ○ Multiple defendants

7) Type of party you represent(ed): (If multiple parties, please check all that apply.)

- ☐ Private individual
- ☐ Unit of government/government official
- ☐ Publicly-held company
- ☐ Privately-held company
- ☐ Nonprofit organization
- ☐ Other (please specify)

If you selected other, please specify:

8) Please indicate the stage of the case at the time it was selected for the Pilot Program, and as it stands today.

When Selected for

	the Pilot Program	Today
FRCP 26(f) Meet and Confer	○	○
Initial Status Conference (FRCP 16(b) Conference)	○	○
Discovery	○	○
Mediation	○	○
Trial	○	○
Settlement or Judgment	○	○

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United States District Court
NORTHERN DISTRICT OF ILLINOIS

Seventh Circuit Electronic Discovery Pilot Program

Please continue to refer to your Pilot Program case.

9) How much of the information exchanged between the parties, in response to requests for documents and information, was (or likely will be) in electronic format?

- ○ Less than 25%
- ○ Between 26% and 50%
- ○ Between 51% and 75%
- ○ More than 75%

10) Did (or do you anticipate that) any REQUESTING party (will) bear a material portion of the costs to produce requested ESI?

- ○ Yes
- ○ No

For simplicity, this survey refers to your "client" in the singular. However, this survey is case-specific, not party-specific. Thus, if you represented multiple parties, please consider the experiences of all your clients collectively, rather than the experience of only one client.

11) For the e-discovery in this case, please indicate the role your client did (or likely will) play:

- ○ Primarily a requesting party
- ○ Primarily a producing party
- ○ Equally a requesting and a producing party
- ○ Neither a requesting nor a producing party

12) Please indicate whether your client's ESI connected with this case could be described as: (please check all that apply.)

- ☐ High volume of data (more than 100 gigabytes or 40 custodians)
- ☐ Legacy data (contained in an archive or obsolete system)
- ☐ Disaster recovery data (contained in a backup system)
- ☐ Segregated data (subject to a special process, e.g., "confidential" information)
- ☐ Automatically updated data (e.g., metadata or online access data)
- ☐ Structured data (e.g., databases, applications)
- ☐ Foreign data (e.g., foreign character sets, data subject to international privacy laws)

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United States District Court
NORTHERN DISTRICT OF ILLINOIS

Seventh Circuit Electronic Discovery Pilot Program

Please continue to refer to your Pilot Program case.

13) Please indicate whether the following events occurred. In the context of this question, "you" means either you personally or another member of your legal team. If the event does not apply due to the particulars or the timing of the case, please check "Not Applicable".

	Yes	No	Not Applicable
At the outset of the case, you discussed the preservation of ESI with opposing counsel.	○	○	○
Prior to meeting with opposing counsel, you became familiar with your client's electronic data and data system(s).	○	○	○
At or soon after the FRCP 26(f) conference, the parties discussed potential methods for identifying ESI for production.	○	○	○
Prior to the initial status conference (FRCP 16 conference), you met with opposing counsel to discuss the discovery process and ESI.	○	○	○
At the initial status conference (FRCP 16 conference), unresolved e-discovery disputes were presented to the court.	○	○	○
E-discovery disputes arising after the initial status conference (FRCP 16 conference) were raised promptly with the court.	○	○	○

14) Please indicate the e-discovery topics discussed with opposing counsel prior to commencing discovery. If discovery has not commenced, please indicate the topics that have been discussed to this point. Please check all that apply.

- ☐ Scope of ESI to be preserved by parties
- ☐ Procedure for preservation of ESI
- ☐ Scope of relevant and discoverable ESI
- ☐ Search methodologies to identify ESI for production
- ☐ Format(s) of production for ESI
- ☐ Conducting e-discovery in phases or stages
- ☐ Data requiring extraordinary affirmative measures to collect (such as: hard drive data that is "deleted", "slack", "fragmented", or "unallocated"; online access data; frequently and automatically updated metadata, backup tapes, etc.)

- ☐ Procedures for handling production of privileged information or work product in electronic form
- ☐ Timeframe for completing e-discovery
- ☐ Any need for special procedures to manage ESI
- ☐ Other (please specify)

If you selected other, please specify:

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United States District Court
NORTHERN DISTRICT OF ILLINOIS

Seventh Circuit Electronic Discovery Pilot Program

Please continue to refer to your Pilot Program case.

FRCP 26(b)(2)(C) calls for consideration of the following factors in determining whether the burden or expense of proposed discovery outweighs its likely benefit: 1) the needs of the case; 2) the amount in controversy; 3) the parties' resources; 4) the importance of the issues at stake in the action; and 5) the importance of the discovery in resolving the issues.

15) Did the proportionality factors set forth in FRCP 26(b)(2)(C) play a significant role in the development of the discovery plan?

- ○ Yes
- ○ No
- ○ No discovery plan for this case

16) Please assess the level of cooperation among opposing counsel in:

	Poor	Adequate	Excellent	Not Applicable
Facilitating understanding of the ESI related to the case	○	○	○	○
Facilitating understanding of the data systems involved	○	○	○	○
Formulating a discovery plan	○	○	○	○
Reasonably limiting discovery requests and responses	○	○	○	○
Ensuring proportional e-discovery consistent with the factors listed in FRCP 26(b)(2)(C)	○	○	○	○

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United States District Court
NORTHERN DISTRICT OF ILLINOIS

Seventh Circuit Electronic Discovery Pilot Program

Please continue to refer to your Pilot Program case.

17) Please assess how application of the Pilot Program Principles has affected (or likely will affect) the following:

	Greatly Increased	Increased	No Effect	Decreased	Greatly Decreased
The level of cooperation exhibited by counsel to efficiently resolve the case	○	○	○	○	○
Your ability to zealously represent your client	○	○	○	○	○
The parties' ability to resolve e-discovery disputes without court involvement	○	○	○	○	○
The fairness of the e-discovery process	○	○	○	○	○
Your ability to obtain relevant documents	○	○	○	○	○
Allegations of spoliation or other sanctionable misconduct regarding the preservation or collection of ESI	○	○	○	○	○
Discovery with respect to another party's efforts to preserve or collect ESI	○	○	○	○	○

18) Please assess how application of the Pilot Program Principles has affected (or is likely to affect) the following:

	Greatly Increased	Increased	No Effect	Decreased	Greatly Decreased
Discovery costs	○	○	○	○	○
Total litigation costs	○	○	○	○	○
Length of the discovery period	○	○	○	○	○
Length of the litigation	○	○	○	○	○
Number of discovery disputes	○	○	○	○	○

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Seventh Circuit Electronic Discovery Pilot Program

19) Type of individual serving as your client's e-discovery liaison: (If you represent(ed) multiple parties, please check all that apply.)

- ☐ In-house counsel
- ☐ Outside counsel
- ☐ Third party consultant
- ☐ Employee of the party
- ☐ No e-discovery liaison designated

20) Please indicate your level of agreement with the following statements.

	Strongly Agree	Agree	Disagree	Strongly Disagree	Not Applicable
The involvement of my client's e-discovery liaison has contributed to a more efficient discovery process.	○	○	○	○	○
The involvement of the e-discovery liaison for the other party/parties has contributed to a more efficient discovery process.	○	○	○	○	○

21) How did application of the Principles affect preservation letters?

- ○ Discouraged my client from sending preservation letter(s)
- ○ Resulted in my client sending more targeted preservation letter(s)
- ○ No effect on the issue of preservation letters

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United States District Court
NORTHERN DISTRICT OF ILLINOIS

Seventh Circuit Electronic Discovery Pilot Program

22) Which aspects of the Pilot Program Principles are the most useful?

23) How could the Pilot Program Principles be improved?

Thank you for completing the survey.

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E.2. Phase Two

E.2.a. Judge Survey E-mail and Questionnaire

****Judges Cover Email****

Dear [FirstName]:

Thank you for your continued participation and assistance in the Seventh Circuit Electronic Discovery Pilot Program. Today we are writing to ask you to please complete, as a part of your participation, the follow-up survey for Phase Two of the Pilot Program. The survey seeks information about your experiences with cases in the Program and will aid in determining the effectiveness of the Seventh Circuit's Principles Relating to Discovery of Electronically Stored Information ("the Principles"). Answering the survey should take only about 10 minutes.

We very much value your opinion, and your responses to the survey are essential to the Program's success. The survey questions seek your thoughts about the usefulness of the Pilot Program Principals and ways to improve them. The collective results of this survey and the survey answered by the attorneys with Pilot Program cases will be instrumental to the evaluation of Phase Two of the Pilot Program and will be featured in presentations at the May 2012 Annual Meeting of the Seventh Circuit Bar Association and Judicial Conference of the Seventh Circuit in Chicago.

Rest assured that all identifying information in connection with your individual responses to the survey is strictly confidential. Neither we, any court's personnel, the Seventh Circuit Electronic Discovery Committee, nor any other judges or lawyers will have access to any individual identifying information regarding your responses. We will, however, know who did and did not respond to the survey.

To answer the survey, please click on the following link: [insert link]

When responding to the survey, please keep in mind the case(s) on your docket that have been a part of the Pilot Program.

We need to have you provide your responses to the survey by February 27, 2012. So, please take a moment as soon as you conveniently can to answer the survey. If you have any problems accessing the survey, please contact Margaret Williams (mwilliams@fjc.gov, 202-502-4078) at the Federal Judicial Center.

Please accept our sincere gratitude and that of the Seventh Circuit Electronic Discovery Committee for your participation.

Thank you again.

Best regards,

Nan and Jim

Phase II Judge Seventh Circuit Electronic Discovery Pilot Program

This is a survey about the Seventh Circuit's Electronic Discovery Pilot Program ("Pilot Program"). You are invited to participate because you are a judge presiding over one or more Pilot Program cases applying the Seventh Circuit's Principles Relating to Discovery of Electronically Stored Information ("Principles"). By answering this survey, you can provide valuable feedback on those procedures. Please complete the survey by Monday, February 27, 2012.

In this survey, we have taken care not to collect any information that could personally identify you or your Pilot Program cases. In addition, your individual answers will be kept strictly confidential. The results of the survey will be presented only in summary form (e.g., group averages). Participation is voluntary, but we encourage you to assist us in the Pilot Program. It is estimated that this survey will take less than 10 minutes to complete.

By clicking "Next Page", you agree to participate in the survey.

In this survey, any discovery seeking information in electronic format will be referred to as "e-discovery". Electronically stored information will be referred to as "ESI".

1) NOT INCLUDING your Pilot Program cases, how many of your cases in the last five years involved e-discovery issues?

m 0 cases
m 1-2 cases
m 3-5 cases
m 6-10 cases
m 11-20 cases
m More than 20 cases

2) The Seventh Circuit's Principles for e-discovery were developed by a committee and are being tested in selected Pilot Program cases, including yours.

Please rate your familiarity with the substance of the Principles.

m 0 Not At All Familiar
m 1
m 2
m 3
m 4
m 5 Very Familiar

This survey is an evaluation of the Pilot Program Principles generally. If you had multiple Pilot

Program cases, please consider them collectively rather than focus on any particular case.

3) Based on your observations at the initial status (FRCP 16(b)) conferences, please rate the extent to which the parties in your Pilot Program cases had conferred in advance on e-discovery issues (e.g., preservation, data accessibility, search methods, production formats, etc.).

m N/A
m 0 No Discussion
m 1
m 2
m 3
m 4
m 5 Comprehensive Discussion

4) Did the proportionality standards set forth in FRCP 26(b)(2)(C) play a significant role in the development of discovery plans for your Pilot Program cases?

m Yes
m No
m Not Applicable

5) Please elaborate why or why not.

_____
_____
_____

6) Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the following:

	Greatly Increased	Increased	No Effect	Decreased	Greatly Decreased
Levels of cooperation exhibited by counsel to efficiently resolve the case	m	m	m	m	m
Likelihood of an agreement on procedures for handling inadvertent disclosure of privileged information or	m	m	m	m	m

work product under FRE 502					
Extent to which counsel meaningfully attempt to resolve discovery disputes before seeking court intervention	m	m	m	m	m
Promptness with which unresolved discovery disputes are brought to the court's attention	m	m	m	m	m
The parties' ability to obtain relevant documents	m	m	m	m	m
Number of allegations of spoliation or other sanctionable misconduct regarding the preservation or collection of ESI	m	m	m	m	m

7) Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or is likely to affect) the following:

	Greatly Increased	Increased	No Effect	Decreased	Greatly Decreased
Length of the discovery period	m	m	m	m	m
Length of the litigation	m	m	m	m	m
Number of discovery disputes brought before the court	m	m	m	m	m
Number of requests for discovery of another party's	m	m	m	m	m

efforts to preserve or collect ESI					
Counsel's ability to zealously represent the litigants	m	m	m	m	m
The fairness of the e-discovery process	m	m	m	m	m

8) Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the following:

	Greatly Increased	Increased	No Effect	Decreased	Greatly Decreased
Counsel's demonstrated level of attention to the technologies affecting the discovery process	m	m	m	m	m
Your level of attention to the technologies affecting the discovery process	m	m	m	m	m
Counsel's demonstrated familiarity with their clients' electronic data and data systems	m	m	m	m	m
Your understanding of the parties' electronic data and data systems for the appropriate resolution of disputes	m	m	m	m	m

9) Please indicate your level of agreement with the following statement, as it relates to your Pilot Program cases.

	Strongly Agree	Agree	Disagree	Strongly Disagree	Not Applicable
The involvement of e-discovery liaison(s) has contributed to a more efficient discovery process.	m	m	m	m	m

10) Do the Principles work better in some cases than in others?

m Yes
m No
m Not Applicable

11) Please use the space below to explain why you believe the Principles had varying rates of success in different cases. What factors influenced their efficacy from case to case?

_____
_____
_____

12) Which aspects of the Pilot Program Principles are the most useful?

_____
_____
_____

13) How could the Pilot Program Principles be improved?

_____
_____
_____

14) If you participated in Phase I of the Program (2009-May 2010), please compare your experience with the Pilot Program Principles during Phases I and II.

_____
_____
_____

Thank you for completing the survey.

E.2.b. Attorney Survey E-mail and Questionnaire

****Attorney Cover Email****

Thank you for your continued participation and assistance in the Seventh Circuit Electronic Discovery Pilot Program. Today we are writing to ask you to complete a 10-minute follow-up survey for Phase Two of the Pilot Program. The survey seeks information about your experiences with the Program and will aid in determining the effectiveness of the Seventh Circuit's Principles Relating to Discovery of Electronically Stored Information ("the Principles").

You are being asked to answer this follow-up survey because you are listed as the lead counsel for one of the parties in the following case: [insert Pilot Program case name]. We are asking that only one counsel per party respond for each case, and accordingly, request that either you or the lawyer on your team with the most knowledge of the e-discovery in the case respond to this survey by clicking on the link below.

Your responses to the survey are essential to the program's success. These questions seek your thoughts about the usefulness of the Pilot Program's Principals and ways to improve them. The results of this survey will be instrumental to evaluating Phase Two of the Pilot Program and will be featured in presentations about the Pilot Program at the May 2012 Annual Meeting of the Seventh Circuit Bar Association and Judicial Conference of the Seventh Circuit in Chicago.

Since the Program's inception in May 2009, we have successfully maintained confidentiality of the content of all participants' individual responses to the surveys we have conducted. Rest assured that all identifying information in connection with your individual responses to the survey is strictly confidential. Neither we, any court personnel, the Seventh Circuit Electronic Discovery Committee, nor any other judges or lawyers will have access to any identifying information about your responses. We cannot emphasize enough the strenuous effort we have taken to put barriers in place to ensure that anonymity of the participants' individual responses is maintained.

For control purposes and for the benefit of evaluating the overall content of the responses, however, track is kept of which attorneys did and did not respond.

To answer the survey, please click on the following link: [insert link]

We need your responses to the survey by no later than February 27, 2012. So, please take a moment as soon as possible to answer. If you have any problems accessing the survey or have other questions, please contact Margaret Williams (mwilliams@fjc.gov, 202-502-4078) at the Federal Judicial Center.

Please accept our sincere gratitude and that of the Seventh Circuit Electronic Discovery Pilot Program Committee for your participation.

Chief District Judge James F. Holderman & Magistrate Judge Nan Nolan

Phase II Attorney Seventh Circuit Electronic Discovery Pilot Program

This is a survey about the Seventh Circuit's Electronic Discovery Pilot Program ("Pilot Program"). You are invited to participate because you are an attorney of record in a Pilot Program case applying the Seventh Circuit's Principles Relating to Discovery of Electronically Stored Information ("Principles"). By answering this survey, you can provide valuable feedback on those procedures. Please complete the survey by Monday, February 27, 2012.

In this survey, we have taken care not to collect any information that could personally identify you or your Pilot Program case. In addition, your individual answers will be kept strictly confidential. The results of the survey will be presented only in summary form (e.g., group averages). Participation is voluntary, but we encourage you to assist us in the Pilot Program. It is estimated that this survey will take less than 10 minutes to complete.

Your Pilot Program case was identified to you in the email containing the survey link. To protect your identity, we will not ask you to specify this case in the survey. However, your answers should reflect what has happened in that particular case. If you are not familiar with the specifics of litigating that case, please forward the email containing the survey link to the most knowledgeable attorney on your legal team.

By clicking "Next Page", you agree to participate in the survey.

1) Number of years you have practiced law, rounded to the nearest year:

_____years

2) Your main area of practice (Please select best option):

m Bankruptcy
m Civil Rights
m Commercial Litigation -- class action
m Commercial Litigation -- not primarily class action
m Employment/Labor/Employee Benefits
m Environmental
m Estate planning
m General Practice
m Government
m Intellectual Property
m Personal Injury
m Real Estate
m Tax
m Other (please specify)

If you selected other, please specify

_____

In this survey, any discovery seeking information in electronic format will be referred to as "e-discovery". Electronically stored information will be referred to as "ESI".

3) NOT INCLUDING your Pilot Program case, how many of your cases in the last five years involved e-discovery?

m 0 cases
m 1-2 cases
m 3-5 cases
m 6-10 cases
m 11-20 cases
m More than 20 cases

4) The Seventh Circuit's Principles for e-discovery were developed by a committee and are being tested in selected Pilot Program cases, including your Pilot Program case.

Please rate your familiarity with the substance of the Principles.

m 0 Not At All Familiar
m 1
m 2
m 3
m 4
m 5 Very Familiar

The following questions refer to your Pilot Program case. "FRCP" refers to the Federal Rules of Civil Procedure.

5) Party/parties you represent(ed):

m Single plaintiff
m Multiple plaintiffs
m Class action plaintiffs
m Single defendant
m Multiple defendants
m Defendants in a class action

6) Type of party you represent(ed): (If multiple parties, please check all that apply.)

q Private individual
q Unit of government/government official
q Publicly-held company
q Privately-held company
q Company with limited resources (defined as gross annual receipts less than $5

million)

q Nonprofit organization
q Other (please specify)

If you selected other, please specify

_____

7) Please indicate the stage of the case at the time it was selected for the Pilot Program, and as it stands today.

	When Selected for the Pilot Program	Today
FRCP 26(f) Meet and Confer	m	m
Initial Status Conference (FRCP 16(b) Conference)	m	m
Discovery	m	m
Mediation	m	m
Trial	m	m
Settlement or Judgment	m	m

Please continue to refer to your Pilot Program case.

8) How much of the information exchanged between the parties, in response to requests for documents and information, was (or likely will be) in electronic format?

m Less than 25%
m Between 26% and 50%
m Between 51% and 75%
m More than 75%

9) Did (or do you anticipate that) any REQUESTING party (will) bear a material portion of the costs to produce requested ESI?

m Yes
m No

For simplicity, this survey refers to your "client" in the singular. However, this survey is case-specific, not party-specific. Thus, if you represented multiple parties, please consider the experiences of all your clients collectively, rather than the experience of only one client.

10) For the e-discovery in this case, please indicate the role your client did (or likely will) play:

m Primarily a requesting party
m Primarily a producing party
m Equally a requesting and a producing party
m Neither a requesting nor a producing party

11) Please indicate whether your client's ESI connected with this case could be described as: (please check all that apply.)

q More than 500GB collected data or more than 25 custodians
q 100-500GB collected data and up to 25 custodians
q Legacy data (contained in an archive or obsolete system)
q Disaster recovery data (contained in a backup system)
q Segregated data (subject to a special process, e.g., "confidential" information)
q Automatically updated data (e.g., metadata or online access data)
q Structured data (e.g., databases, applications)
q Foreign data (e.g., foreign character sets, data subject to international privacy laws)

Please continue to refer to your Pilot Program case.

12) Please indicate whether the following events occurred. In the context of this question, "you" means either you personally or another member of your legal team. If the event does not apply due to the particulars or the timing of the case, please check "Not Applicable".

	Yes	No	Not Applicable
At the outset of the case, you discussed the preservation of ESI with opposing counsel.	m	m	m
Prior to meeting with opposing counsel, you became familiar with your client's electronic data and data system(s).	m	m	m

At or soon after the FRCP 26(f) conference, the parties discussed potential methods for identifying ESI for production.	m	m	m
Prior to the initial status conference (FRCP 16 conference), you met with opposing counsel to discuss the discovery process and ESI.	m	m	m
At the initial status conference (FRCP 16 conference), unresolved e-discovery disputes were presented to the court.	m	m	m
E-discovery disputes arising after the initial status conference (FRCP 16 conference) were raised promptly with the court.	m	m	m

13) Please indicate the e-discovery topics discussed with opposing counsel prior to commencing discovery. If discovery has not commenced, please indicate the topics that have been discussed to this point. Please check all that apply.

q Scope of ESI to be preserved by parties
q Procedure for preservation of ESI
q Scope of relevant and discoverable ESI
q Search methodologies to identify ESI for production
q Format(s) of production for ESI
q Conducting e-discovery in phases or stages
q Data requiring extraordinary affirmative measures to collect (such as: hard drive data

that is "deleted", "slack", "fragmented", or "unallocated"; online access data; frequently and automatically updated metadata, backup tapes, etc.)

q Procedures for handling production of privileged information or work product in electronic form

q Timeframe for completing e-discovery

q Any need for special procedures to manage ESI

q Other (please specify)

If you selected other, please specify

_____

Please continue to refer to your Pilot Program case.

FRCP 26(b)(2)(C) calls for consideration of the following factors in determining whether the burden or expense of proposed discovery outweighs its likely benefit: 1) the needs of the case; 2) the amount in controversy; 3) the parties' resources; 4) the importance of the issues at stake in the action; and 5) the importance of the discovery in resolving the issues.

14) Did the proportionality factors set forth in FRCP 26(b)(2)(C) play a significant role in the development of the discovery plan?

m Yes
m No
m No discovery plan for this case

15) Would your limited resource clients be more inclined to pursue or defend litigation as a remedy if e-discovery costs were reduced?

m Yes
m No

16) Please assess the level of cooperation among opposing counsel in:

	Poor	Adequate	Excellent	Not Applicable
Facilitating understanding of the ESI related to the case	m	m	m	m
Facilitating understanding of the data systems involved	m	m	m	m
Formulating a discovery plan	m	m	m	m
Reasonably	m	m	m	m

limiting discovery requests and responses				
Ensuring proportional e-discovery consistent with the factors listed in FRCP 26(b)(2)(C)	m	m	m	m

Please continue to refer to your Pilot Program case.

17) Please assess how application of the Pilot Program Principles has affected (or likely will affect) the following:

	Greatly Increased	Increased	No Effect	Decreased	Greatly Decreased
The level of cooperation exhibited by counsel to efficiently resolve the case	m	m	m	m	m
Your ability to zealously represent your client	m	m	m	m	m
The parties' ability to resolve e-discovery disputes without court involvement	m	m	m	m	m
The fairness of the e-discovery process	m	m	m	m	m
Your ability to obtain relevant documents	m	m	m	m	m
Allegations of spoliation or other sanctionable misconduct	m	m	m	m	m

regarding the preservation or collection of ESI					
Discovery with respect to another party's efforts to preserve or collect ESI	m	m	m	m	m

18) Please assess how application of the Pilot Program Principles has affected (or is likely to affect) the following:

	Greatly Increased	Increased	No Effect	Decreased	Greatly Decreased
Discovery costs	m	m	m	m	m
Total litigation costs	m	m	m	m	m
Length of the discovery period	m	m	m	m	m
Length of the litigation	m	m	m	m	m
Number of discovery disputes	m	m	m	m	m

19) Type of individual serving as your client's e-discovery liaison: (If you represent(ed) multiple parties, please check all that apply.)

q In-house counsel
q Outside counsel
q Third party consultant
q Employee of the client
q No e-discovery liaison designated

20) Please indicate your level of agreement with the following statements.

	Strongly Agree	Agree	Disagree	Strongly Disagree	Not Applicable
The involvement of my client's e-discovery liaison has contributed to a more efficient	m	m	m	m	m

discovery process.					
The involvement of the e-discovery liaison for the other party/parties has contributed to a more efficient discovery process.	m	m	m	m	m

21) How did application of the Principles affect preservation letters?

m Discouraged my client from sending preservation letter(s)
m Resulted in my client sending more targeted preservation letter(s)
m No effect on the issue of preservation letters

22) Which aspects of the Pilot Program Principles are the most useful?

_____
_____
_____

23) How could the Pilot Program Principles be improved?

_____
_____
_____

Thank you for completing the survey.

E.2.c. August 2010
E-filer Baseline Survey E-mail and Questionnaire

<<N.D. Illinois>>

Subject line: CM/ECF E-filers

Dear [First name] [Last name],

As the United States District Court's Chief Judge, I am always striving to improve our service to the members of our bar. Accordingly, the Seventh Circuit, in cooperation with the Federal Judicial Center (FJC), has designed a brief twelve question survey to obtain basic information about our court's e-filing bar.

If you would take just five minutes to answer the survey, I would very much appreciate it. All responses go directly to the FJC and will only be presented to the court as composite numbers. Your participation in the survey and your individual responses will be kept confidential.

Click on the following link to access the survey:

INSERT LINK

Please respond by August 11, if at all possible.

Thank you for assisting us in making the litigation process in our court better.

Chief Judge James F. Holderman

<<C.D. Illinois>>

Subject line: CM/ECF E-filers

Dear [First name] [Last name],

As the United States District Court's Chief Judge, I am always striving to improve our service to the members of our bar. Accordingly, the Seventh Circuit, in cooperation with the Federal Judicial Center (FJC), has designed a brief twelve question survey to obtain basic information about our court's e-filing bar.

If you would take just five minutes to answer the survey, I would very much appreciate it. All responses go directly to the FJC and will only be presented to the court as composite numbers. Your participation in the survey and your individual responses will be kept confidential.

Click on the following link to access the survey:

INSERT LINK

Please respond by August 11, if at all possible.

Thank you for assisting us in making the litigation process in our court better.

Chief Judge Michael P. McCuskey

<<S.D. Illinois>>

Subject line: CM/ECF E-filers

Dear [First name] [Last name],

As the United States District Court's Chief Judge, I am always striving to improve our service to the members of our bar. Accordingly, the Seventh Circuit, in cooperation with the Federal Judicial Center (FJC), has designed a brief twelve question survey to obtain basic information about our court's e-filing bar.

If you would take just five minutes to answer the survey, I would very much appreciate it. All responses go directly to the FJC and will only be presented to the court as composite numbers. Your participation in the survey and your individual responses will be kept confidential.

Click on the following link to access the survey:

INSERT LINK

Please respond by August 11, if at all possible.

Thank you for assisting us in making the litigation process in our court better.

Chief Judge David R. Herndon

<<N.D. Indiana

Subject line: CM/ECF E-filers

Dear [First name] [Last name],

As the United States District Court's Chief Judge, I am always striving to improve our service to the members of our bar. Accordingly, the Seventh Circuit, in cooperation with the Federal Judicial Center (FJC), has designed a brief twelve question survey to obtain basic information about our court's e-filing bar.

If you would take just five minutes to answer the survey, I would very much appreciate it. All responses go directly to the FJC and will only be presented to the court as composite numbers. Your participation in the survey and your individual responses will be kept confidential.

Click on the following link to access the survey:

INSERT LINK

Please respond by August 11, if at all possible.

Thank you for assisting us in making the litigation process in our court better.

Chief Judge Philip P. Simon

<<S.D. Indiana>>

Subject line: CM/ECF E-filers

Dear [First name] [Last name],

As the United States District Court's Chief Judge, I am always striving to improve our service to the members of our bar. Accordingly, the Seventh Circuit, in cooperation with the Federal Judicial Center (FJC), has designed a brief twelve question survey to obtain basic information about our court's e-filing bar.

If you would take just five minutes to answer the survey, I would very much appreciate it. All responses go directly to the FJC and will only be presented to the court as composite numbers. Your participation in the survey and your individual responses will be kept confidential.

Click on the following link to access the survey:

INSERT LINK

Please respond by August 11, if at all possible.

Thank you for assisting us in making the litigation process in our court better.

Chief Judge Richard L. Young

<<E.D. Wisconsin>>

Subject line: CM/ECF E-filers

Dear [First name] [Last name],

As the United States District Court's Chief Judge, I am always striving to improve our service to the members of our bar. Accordingly, the Seventh Circuit, in cooperation with the Federal Judicial Center (FJC), has designed a brief twelve question survey to obtain basic information about our court's e-filing bar.

If you would take just five minutes to answer the survey, I would very much appreciate it. All responses go directly to the FJC and will only be presented to the court as composite numbers. Your participation in the survey and your individual responses will be kept confidential.

Click on the following link to access the survey:

INSERT LINK

Please respond by August 11, if at all possible.

Thank you for assisting us in making the litigation process in our court better.

Chief Judge Charles N. Clevert Jr.

<<W.D. Wisconsin>>

Subject line: CM/ECF E-filers

Dear [First name] [Last name],

As you know, the United States District Court for the Western District of Wisconsin is always striving to improve its service to the members of our bar. The Seventh Circuit, in cooperation with the Federal Judicial Center (FJC), has designed a brief twelve-question survey to obtain basic information about our district court's e-filing bar and e-discovery issues.

If you would take just five minutes to answer the survey, I would very much appreciate it. All responses go directly to the FJC and will only be presented to the court as composite numbers. Your participation in the survey and your individual responses will be kept confidential.

Click on the following link to access the survey:

INSERT LINK

If at all possible, please respond by August 11, and thank you for assisting us in making the litigation process in our court better.

Chief Judge William M. Conley

Seventh Circuit

1) Which of the following best describes your practice?

- ○ Private firm sole practitioner
- ○ Private firm 2-10 attorneys
- ○ Private firm 11-25 attorneys
- ○ Private firm 26-50 attorneys
- ○ Private firm 51-100 attorneys
- ○ Private firm 101-250 attorneys
- ○ Private firm 251-500 attorneys
- ○ Private firm more than 500 attorneys
- ○ House/Corporate Counsel
- ○ Federal government
- ○ State or local government
- ○ Other (please specify)

If you selected other, please specify:

2) Which of the following types of cases do you usually litigate in federal court? Select up to three.

- ○ Administrative Law
- ○ Antitrust
- ○ Bankruptcy
- ○ Civil rights
- ○ Complex commercial transactions
- ○ Consumer protection
- ○ Contracts (generally)
- ○ Employment discrimination
- ○ Environmental law
- ○ ERISA
- ○ Insurance
- ○ Intellectual property
- ○ Labor law
- ○ Personal injury
- ○ Products liability
- ○ Professional malpractice
- ○ Securities
- ○ Torts (generally)
- ○ Other (please specify)

If you selected other, please specify:

3) Do you typically represent plaintiffs, defendants, or both about equally?

- ○ Plaintiffs
- ○ Defendants
- ○ Both Equally

4) Thinking of your federal cases in the past three years, please rate the level of cooperation demonstrated by opposing counsel in the discovery process.

- ○ 1 Very Uncooperative
- ○ 2 Uncooperative
- ○ 3 Cooperative
- ○ 4 Very Cooperative

5) Thinking of the same cases, please rate the level of cooperation that you demonstrated in the discovery process.

- ○ 1 Very Uncooperative
- ○ 2 Uncooperative
- ○ 3 Cooperative
- ○ 4 Very Cooperative

6) How often do your cases involve the discovery of electronically stored information and documents (e.g., e-mail, voice mail records, information from electronic databases)?

- ○ Always
- ○ Frequently
- ○ Sometimes
- ○ Rarely
- ○ Never

7) Thinking of the opposing counsel in your federal cases in the past three years, please rate the opposing counsel's level of knowledge and experience the discovery of electronically stored information and documents (e.g., e-mail, voice mail records, information from electronic databases).

- ○ 1 Very knowledgeable
- ○ 2 Knowledgeable
- ○ 3 Not knowledgeable
- ○ 4 Very unknowledgeable

8) Please rate your own level of knowledge of and experience with discovery of electronically stored information and documents.

- ○ 1 Very knowledgeable
- ○ 2 Knowledgeable
- ○ 3 Unknowledgeable
- ○ 4 Very unknowledgeable

9) Thinking about the Requests for Production **received** in your federal cases in the past three years, please rate the level of proportionality the costs, resources required and ease of identification and production of electronically stored information and documents had in comparison to the value and complexity of claims and defenses involved.

O Disproportionate

O Proportionate

10) Thinking about the responses to **your** Requests for Production received in your federal cases in the past three years, please rate the level of proportionality the costs, resources required and ease of identification and production of electronically stored information and documents had in comparison to the value and complexity of claims and defenses involved.

O Disproportionate

O Proportionate

11) Please rate your own level of knowledge with respect to the Seventh Circuit Electronic Discovery Pilot Program Phase One Principles?

O 1 Very knowledgeable
O 2 Knowledgeable
O 3 Unknowledgeable
O 4 Very unknowledgeable

12) In March 2010, did you respond to the Seventh Circuit Electronic Discovery Pilot Program Attorney Survey Questionnaire?

___ Yes ___ No

E.2.d. March 2012
E-filer Baseline Survey E-mail and Questionnaire

Draft of E-mail to be Sent Over Your Name, if You Approve, for Electronic Discovery 2012 Baseline Survey in Your District for the Seventh Circuit E-Discovery Pilot Program

James Holderman to: Emery Lee 02/02/2012 12:16 PM
Sent by: **Margaret Winkler**
Cc: Nan Nolan

From: James Holderman/ILND/07/USCOURTS
To: Emery Lee/FJC/AO/USCOURTS@FJC
Cc: Nan Nolan/ILND/07/USCOURTS@USCOURTS
Sent by: Margaret Winkler/ILND/07/USCOURTS

Emery,

We now have approval from all seven chief district judges for the sending of the below e-mail over each of their names when you desire to do so.

Thank you again for all your assistance on the Seventh Circuit Electronic Discovery Pilot Program and everything else you do at the FJC.

Jim

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Re: 2012 Electronic Filer Survey

Dear (FIRST NAME, LAST NAME),

As the United States District Court's Chief Judge, I constantly strive to improve our service to the members of our bar. Accordingly, the Seventh Circuit, in cooperation with the Federal Judicial Center, has designed a brief survey as a follow-up to the survey I sent our bar's e-filing members in 2010.

If you would take just five minutes to answer the survey, I would very much appreciate it. Click on the following link to access the survey:

INSERT LINK

Please respond by INSERT DATE, if at all possible.

Thank you for assisting us in making the litigation process in our court better.

If you have questions, please contact Emery Lee at elee@fjc.gov or 202-502-4078.

Chief Judge Insert

March 2012

Northern District of Illinois E-Filer Survey

1) Which of the following best describes your practice?

- ❍ Private firm sole practitioner
- ❍ Private firm 2-10 attorneys
- ❍ Private firm 11-25 attorneys
- ❍ Private firm 26-50 attorneys
- ❍ Private firm 51-100 attorneys
- ❍ Private firm 101-250 attorneys
- ❍ Private firm 251-500 attorneys
- ❍ Private firm more than 500 attorneys
- ❍ House/Corporate Counsel
- ❍ Federal government
- ❍ State or local government
- ❍ Other (please specify)

If you selected other, please specify

_____

2) Which of the following types of cases do you usually litigate in federal court? Please select up to three options.

- ❑ Administrative Law
- ❑ Antitrust
- ❑ Bankruptcy
- ❑ Civil rights
- ❑ Complex commercial transactions
- ❑ Consumer protection
- ❑ Contracts (generally)
- ❑ Employment discrimination
- ❑ Environmental law
- ❑ ERISA
- ❑ Insurance
- ❑ Intellectual property
- ❑ Labor law
- ❑ Personal injury
- ❑ Products liability
- ❑ Professional malpractice
- ❑ Securities
- ❑ Torts (generally)
- ❑ Other (please specify)

If you selected other, please specify

_____

3) Do you typically represent plaintiffs, defendants, or both about equally?

- ❍ Plaintiffs
- ❍ Defendants
- ❍ Both equally

4) Thinking of your federal cases in the past three years, please rate the level of cooperation demonstrated by opposing counsel in the discovery process.

- ❍ 1 Very Uncooperative
- ❍ 2 Uncooperative
- ❍ 3 Cooperative
- ❍ 4 Very Cooperative

5) Thinking of the same cases, please rate the level of cooperation that you demonstrated in the discovery process.

- ❍ 1 Very Uncooperative
- ❍ 2 Uncooperative
- ❍ 3 Cooperative
- ❍ 4 Very Cooperative

6) How often do your cases involve the discovery of electronically stored information and documents (e.g., e-mail, voice mail records, information from electronic databases)?

- ❍ Always
- ❍ Frequently
- ❍ Sometimes
- ❍ Rarely
- ❍ Never

7) Thinking of the opposing counsel in your federal cases in the past three years, please rate the opposing counsel's level of knowledge of and experience with the discovery of electronically stored information and documents (e.g., e-mail, voice mail records, information from electronic databases).

- ❍ 1 Very knowledgeable
- ❍ 2 Knowledgeable
- ❍ 3 Not knowledgeable
- ❍ 4 Very unknowledgeable

8) Please rate your own level of knowledge of and experience with discovery of electronically stored information and documents.

- ❍ 1 Very knowledgeable

❍ 2 Knowledgeable
❍ 3 Not knowledgeable
❍ 4 Very unknowledgeable

9) Thinking about the Requests for Production received in your federal cases in the past three years, please rate the level of proportionality the costs, resources required and ease of identification and production of electronically stored information and documents had in comparison to the value and complexity of claims and defenses involved.

❍ Disproportionate
❍ Proportionate

10) Thinking about the responses to your Requests for Production in your federal cases in the past three years, please rate the level of proportionality the costs, resources required and ease of identification and production of electronically stored information and documents had in comparison to the value and complexity of claims and defenses involved.

❍ Disproportionate
❍ Proportionate

11) Please rate your own level of knowledge with respect to the Seventh Circuit Electronic Discovery Pilot Program Phase One Principles.

❍ 1 Very knowledgeable
❍ 2 Knowledgeable
❍ 3 Not knowledgeable
❍ 4 Very unknowledgeable

12) Are you aware of the Seventh Circuit Electronic Discovery Pilot Program's website, www.discoverypilot.com?

❍ Yes
❍ No

13) Have you visited the Program's website?

❍ Yes
❍ No

14) Are you aware of the fact that the Program has sponsored a series of webinars, and that copies of those webinars are available on the Program's website?

❍ Yes
❍ No

15) Have you viewed or listened to any of the Program's webinars?

❍ Yes

❍ No

16) Have you used the 7th Circuit and National E-discovery case law lists, or any of the other resources available on the Program's website?

❍ Yes
❍ No

17) Have you participated in any of the educational programs offered by the Program?

❍ Yes
❍ No

Thank you for completing the survey.

F. Survey Data Results

F.1. Phase One

F.1.a. Judge Survey

INSTITUTE *for the* ADVANCEMENT *of the* AMERICAN LEGAL SYSTEM

UNIVERSITY OF DENVER

DATA ANALYSIS FOR THE SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM:

SURVEY OF JUDGES

TABLE OF CONTENTS

PART I: AGGREGATE SURVEY RESULTS

.

In this survey, any discovery seeking information in electronic format will be referred to as "e-discovery". Electronically stored information will be referred to as "ESI".

1. NOT INCLUDING your Pilot Program cases, how many of your cases in the last five years involved e-discovery issues?

- 0 cases
- 1-2 cases
- 3-5 cases
- 6-10 cases
- 11-20 cases
- More than 20 cases

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	3-5 cases	3	23.1	23.1	23.1
	6-10 cases	4	30.8	30.8	53.8
	11-20 cases	3	23.1	23.1	76.9
	More than 20 cases	3	23.1	23.1	100.0
	Total	13	100.0	100.0	

- All respondents (13) answered this question:
  - Three respondents (23%) selected "3-5 cases;"
  - Four respondents (31%) selected "6-10 cases;"
  - Three respondents (23%) selected "11-20 cases;"
  - Three respondents (23%) selected "more than 20 cases."

- All respondents indicated having at least three cases in the last five years involving e-discovery issues; no respondents selected the "0 cases" or "1-2 cases" response options.

- Ten respondents (77%) have averaged more than one case with e-discovery issues per year for the last five years; six respondents (46%) have averaged more than two cases per year.

The Seventh Circuit's Principles for e-discovery were developed by a committee and are being tested in selected Pilot Program cases, including yours.

2. Please rate your current familiarity with the substance of the Principles.

Not At All Familiar	◄——————————————————►				**Very Familiar**
0	1	2	3	4	5
□	□	□	□	□	□

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	3	2	15.4	18.2	18.2
	4	3	23.1	27.3	45.5
	5 (Very Familiar)	6	46.2	54.5	100.0
	Total	11	84.6		
	Missing System	2	15.4		
	Total	13	100.0		

- Two respondents (15% of total respondents) declined to answer this question.

- Of those who provided an answer (11):
  - Two respondents (18%) selected "3";
  - Three respondents (27%) selected "4";
  - Six respondents (55%) selected "5".

- Of those who provided an answer, all indicated that their familiarity with the substance of the Principles was at least a 3 on a scale from 0 (not at all familiar) to 5 (very familiar).

- A majority of respondents indicated the highest level of familiarity with the substance of the Principles.

3. Your Pilot Program case type(s):
(Check all that apply to your pilot program cases.)

- □ Bankruptcy
- □ Civil Rights
- □ Contract
- □ Federal Tax
- □ Forfeiture/Penalty
- □ Employment/Labor/Employee Benefits
- □ Prisoner Petition
- □ Property Rights (copyright, patent, trademark)
- □ Real Property
- □ Social Security
- □ Torts (personal injury)
- □ Torts (personal property)
- □ Other: _____ (please specify)

Bankruptcy

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	13	100.0	100.0	100.0

Civil Rights

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	8	61.5	61.5	61.5
	Yes	5	38.5	38.5	100.0
	Total	13	100.0	100.0	

Contract

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	5	38.5	38.5	38.5
	Yes	8	61.5	61.5	100.0
	Total	13	100.0	100.0	

Federal Tax

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	13	100.0	100.0	100.0

Forfeiture/Penalty

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	13	100.0	100.0	100.0

Employment/Labor/Employee Benefits

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	7	53.8	53.8	53.8
	Yes	6	46.2	46.2	100.0
	Total	13	100.0	100.0	

Prisoner Petition

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	13	100.0	100.0	100.0

Property Rights (copyright, patent, trademark)

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	4	30.8	30.8	30.8
	Yes	9	69.2	69.2	100.0
	Total	13	100.0	100.0	

Real Property

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	11	84.6	84.6	84.6
	Yes	2	15.4	15.4	100.0
	Total	13	100.0	100.0	

Social Security

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	13	100.0	100.0	100.0

Torts (Personal Injury)

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	12	92.3	92.3	92.3
	Yes	1	7.7	7.7	100.0
	Total	13	100.0	100.0	

Torts (personal property)

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	8	61.5	61.5	61.5
	Yes	5	38.5	38.5	100.0
	Total	13	100.0	100.0	

Other

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	5	38.5	38.5	38.5
	Yes	8	61.5	61.5	100.0
	Total	13	100.0	100.0	

Other Text

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	*NO RESPONSE*	5	38.5	38.5	38.5
	Antitrust	2	15.4	15.4	53.8
	Class action minimum wage law	1	7.7	7.7	61.5
	Consumer, Securities Fraud	1	7.7	7.7	69.2
	ERISA/securities; Consumer law;	1	7.7	7.7	76.9
	FLSA	1	7.7	7.7	84.6
	Patent, Trademark, Business disputes	1	7.7	7.7	92.3
	Securities fraud / Violation of the securities exchange act / Fair Credit Reporting Act / Truth In Lending Act	1	7.7	7.7	100.0
	Total	13	100.0	100.0	

- No respondents (0%) indicated having any of the following case types in the pilot program:
  - Bankruptcy;
  - Federal Tax;
  - Forfeiture/Penalty;
  - Prisoner Petition; and
  - Social Security.

- From the categories provided:
  - Nine respondents (69%) had a "property rights (copyright, patent, trademark)" case;
  - Eight respondents (62%) had a "contract" case;
  - Six respondents (46%) had a "employment/labor/employee benefits" case;
  - Five respondents (39%) had a "civil rights" case;
  - Five respondents (39%) had a "torts (personal property)" case;
  - Two respondents (15%) had a "real property" case; and
  - One respondent (8%) had a "torts (personal injury)" case.

- Five respondents (62%) selected "other" and wrote in the case type. The committee will need to decide whether to classify any of the "other" responses into one of the categories provided or to make it a separate category. If this is done, the percentages will need to be re-calculated (out of a total of 13 respondents).

This survey is an evaluation of the Pilot Program Principles generally. If you had multiple Pilot Program cases, please consider them collectively rather than focus on any particular case.

4. Based on your observations at the initial status (FRCP 16(b)) conferences, please rate the extent to which the parties in your Pilot Program cases had conferred in advance on e-discovery issues (e.g., preservation, data accessibility, search methods, production formats, etc.).

N/A	No Discussion ←					→ Comprehensive Discussion
□	0 □	1 □	2 □	3 □	4 □	5 □

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	1	1	7.7	9.1	9.1
	2	3	23.1	27.3	36.4
	3	7	53.8	63.6	100.0
	Total	11	84.6	100.0	
Missing	System	2	15.4		
Total		13	100.0		

- Two respondents (15% of total respondents) declined to answer the question.

- Of those who provided an answer (11):
  - One respondent (9%) selected "1" (or minimal discussion);
  - Three respondents (27%) selected "2;"
  - Seven respondents (64%) selected "3".

- No respondents (0%) indicated that the question was not applicable and no respondents (0%) indicated that the parties had "no discussion" in advance of the initial status conference concerning e-discovery issues.

- All indicated that the extent to which the parties conferred did not go beyond a 3 on a scale from 0 (no discussion) to 5 (comprehensive discussion).

- Thus, a majority of respondents indicated that the parties conferred about e-discovery prior to the initial status conference on a level mid-way between minimal discussion and comprehensive discussion.

5. Did the proportionality standards set forth in FRCP 26(b)(2)(C) play a significant role in the development of discovery plans for your Pilot Program cases?

- Yes
- No
- N/A

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	8	61.5	66.7	66.7
	No	3	23.1	25.0	91.7
	Not Applicable	1	7.7	8.3	100.0
	Total	12	92.3		
	Missing System	1	7.7		
	Total	13	100.0		

- One respondent (8% of total respondents) declined to answer the question.

- Of those who provided an answer (12):
  - One respondent (8%) indicated that the question on development of discovery plans was "not applicable" to his or her Pilot Program cases;
  - Eight respondents (67%) indicated that the FRCP proportionality standards played a significant role in the development of discovery plans for their Pilot Program cases;
  - Three respondents (25%) indicated that the FRCP proportionality standards did not play a significant role in the development of discovery plans.

- A majority of respondents incorporated proportionality standards into the discovery plan for Pilot Program cases.

6. Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the following:

	Greatly Increased	Increased	No Effect	Decreased	Greatly Decreased
a. Level of cooperation exhibited by counsel to efficiently resolve the case	□	□	□	□	□
b. Likelihood of an agreement on procedures for handling inadvertent disclosure of privileged information or work product under FRE 502	□	□	□	□	□
c. Extent to which counsel meaningfully attempt to resolve discovery disputes before seeking court intervention	□	□	□	□	□
d. Promptness with which unresolved discovery disputes are brought to the court's attention	□	□	□	□	□
e. The parties' ability to obtain relevant documents	□	□	□	□	□
f. Number of allegations of spoliation or other sanctionable misconduct regarding the preservation or collection of ESI	□	□	□	□	□

a. Levels of cooperation exhibited by counsel to efficiently resolve the case

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Greatly Increased	4	30.8	30.8	30.8
	Increased	7	53.8	53.8	84.6
	No Effect	2	15.4	15.4	100.0
	Total	13	100.0	100.0	

- All respondents (13) answered this question:
  - Four respondents (31%) indicated that the Principles "greatly increased" the levels of cooperation;
  - Seven respondents (54%) indicated that the Principles "increased" the levels of cooperation;
  - Two respondents (15%) indicated that the Principles had "no effect" on the levels of cooperation.

- No respondents (0%) indicated that application of the Principles "decreased" or "greatly decreased" the levels of cooperation exhibited by counsel to efficiently resolve the case.

- A strong majority (85%) indicated that the Principles had a positive effect on cooperation.

b. Likelihood of an agreement on procedures for handling inadvertent disclosure of privileged information or work product under FRE 502

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Greatly Increased	6	46.2	46.2	46.2
	Increased	6	46.2	46.2	92.3
	No Effect	1	7.7	7.7	100.0
	Total	13	100.0	100.0	

- All respondents (13) answered this question:
  - Six respondents (46%) indicated that the Principles "greatly increased" the likelihood of an FRE 502 agreement;
  - Six respondents (46%) indicated that the Principles "increased" the likelihood of an agreement under FRE 502;
  - One respondent (8%) indicated that the Principles had "no effect" on the levels of cooperation.

- No respondents (0%) indicated that application of the Principles "decreased" or "greatly decreased" the likelihood of an agreement under FRE 502 for inadvertent disclosure of privileged information or work product.

- A very strong majority (92%) indicated that the Principles had a positive effect on reaching an agreement for the inadvertent disclosure of privileged information or work product.

c. Extent to which counsel meaningfully attempt to resolve discovery disputes before seeking court intervention

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Greatly Increased	6	46.2	46.2	46.2
	Increased	6	46.2	46.2	92.3
	No Effect	1	7.7	7.7	100.0
	Total	13	100.0	100.0	

- All respondents (13) answered this question:
  - Six respondents (46%) indicated that the Principles "greatly increased" the extent of efforts to reach out-of-court resolutions to discovery disputes;
  - Six respondents (46%) indicated that the Principles "increased" the extent of efforts reach out-of-court resolutions;
  - One respondent (8%) indicated that the Principles had "no effect" on the extent of efforts to reach out-of-court resolutions.

- No respondents (0%) indicated that application of the Principles "decreased" or "greatly decreased" the extent to which counsel meaningfully attempt to resolve discovery disputes prior to seeking court intervention.

- A very strong majority (92%) indicated that the Principles had a positive effect on the extent to which counsel meaningfully attempt to resolve discover disputes before requesting court involvement.

d. Promptness with which unresolved discovery disputes are brought to the court's attention

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Greatly Increased	2	15.4	15.4	15.4
	Increased	6	46.2	46.2	61.5
	No Effect	5	38.5	38.5	100.0
	Total	13	100.0	100.0	

- All respondents (13) answered this question:
  - Two respondents (15%) indicated that the Principles "greatly increased" the prompt raising of discovery disputes with the court;
  - Six respondents (46%) indicated that the Principles "increased" the prompt raising of discovery disputes;
  - Five respondents (39%) indicated that the Principles had "no effect" on the prompt raising of discovery disputes.

- No respondents (0%) indicated that application of the Principles "decreased" or "greatly decreased" the promptness with which unresolved discovery disputes are brought to the court's attention.

- A majority (61%) indicated that the Principles had a positive effect on the promptness with which the parties raised unresolved discovery disputes with the court.

e. The parties' ability to obtain relevant documents

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Greatly Increased	1	7.7	7.7	7.7
	Increased	8	61.5	61.5	69.2
	No Effect	4	30.8	30.8	100.0
	Total	13	100.0	100.0	

- All respondents (13) answered this question:
  - One respondent (8%) indicated that the Principles "greatly increased" the ability to obtain relevant documents;
  - Eight respondents (62%) indicated that the Principles "increased" the ability to obtain relevant documents;

- Four respondents (31%) indicated that the Principles had "no effect" on the ability to obtain relevant documents.

- No respondents (0%) indicated that application of the Principles "decreased" or "greatly decreased" the parties' ability to obtain relevant documents.

- A majority (70%) indicated that the Principles had a positive effect on the parties' ability to obtain relevant documents.

f. Number of allegations of spoliation or other sanctionable misconduct regarding the preservation or collection of ESI

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Decreased	4	30.8	30.8	30.8
	Greatly Decreased	1	7.7	7.7	38.5
	No Effect	8	61.5	61.5	100.0
	Total	13	100.0	100.0	

- All respondents (13) answered this question:
  - One respondent (8%) indicated that the Principles "greatly decreased" allegations of sanctionable misconduct;
  - Four respondents (31%) indicated that the Principles "decreased" allegations of sanctionable misconduct;
  - Eight respondents (62%) indicated that the Principles had "no effect" on allegations of sanctionable misconduct.

- No respondents (0%) indicated that application of the Principles "increased" or "greatly increased" the number of allegations of sanctionable misconduct regarding ESI preservation or collection.

- Nearly 40% of respondents (39%) indicated that the Principles had a positive (decrease) effect on the number of allegations of misconduct related to ESI preservation and collection; all respondents indicated that the effect was either positive or neutral.

7. Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the following:

	Greatly Increased	Increased	No Effect	Decreased	Greatly Decreased
a. Length of the discovery period	☐	☐	☐	☐	☐
b. Length of the litigation	☐	☐	☐	☐	☐
c. Number of discovery disputes brought before the court	☐	☐	☐	☐	☐
d. Number of requests for discovery of another party's efforts to preserve or collect ESI	☐	☐	☐	☐	☐
e. Counsel's ability to zealously represent the litigants	☐	☐	☐	☐	☐

a. Length of the discovery period

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Decreased	4	30.8	30.8	30.8
	No Effect	9	69.2	69.2	100.0
	Total	13	100.0	100.0	

- All respondents (13) answered this question:
  - Four respondents (31%) indicated that the Principles "decreased" the discovery period;
  - Nine respondents (69%) indicated that the Principles had "no effect" on the discovery period.

- No respondents (0%) indicated that application of the Principles "increased" or "greatly increased" the length of the discovery period.

- All respondents indicated that the effect of the Principles on the length of discovery was either positive (decrease) or neutral.

b. Length of the litigation

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Decreased	4	30.8	30.8	30.8
	No Effect	9	69.2	69.2	100.0
	Total	13	100.0	100.0	

- All respondents (13) answered this question:
  - Four respondents (31%) indicated that the Principles "decreased" litigation time;
  - Nine respondents (69%) indicated that the Principles had "no effect" on litigation time.

- No respondents (0%) indicated that application of the Principles "increased" or "greatly increased" the length of the litigation.

- All respondents (100%) indicated that the effect of the Principles on the length of the litigation was either positive (decrease) or neutral.

c. Number of discovery disputes brought before the court

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Decreased	10	76.9	76.9	76.9
	Greatly Decreased	1	7.7	7.7	84.6
	Increased	1	7.7	7.7	92.3
	No Effect	1	7.7	7.7	100.0
	Total	13	100.0	100.0	

- All respondents (13) answered this question:
  - One respondent (8%) indicated that the Principles "increased" the number of discovery disputes raised with the court;
  - Ten respondents (77%) indicated that the Principles "decreased" the number of discovery disputes;
  - One respondent (8%) indicated that the Principles "greatly decreased" the number of discovery disputes;
  - One respondent (8%) indicated "no effect" on the number of discovery disputes.

- A solid majority of respondents (85%) indicated that the Principles had a positive (decrease) effect on the number of discovery disputes brought before the court; more than nine out of ten respondents (93%) indicated that the effect was either positive or neutral.

d. Number of requests for discovery of another party's efforts to preserve or collect ESI

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Decreased	7	53.8	53.8	53.8
	Greatly Decreased	1	7.7	7.7	61.5
	Increased	1	7.7	7.7	69.2
	No Effect	4	30.8	30.8	100.0
	Total	13	100.0	100.0	

- All respondents (13) answered this question:
  - One respondent (8%) indicated that the Principles "increased" the number of requests to discovery another party's ESI preservation and collection efforts;
  - Seven respondents (54%) indicated that the Principles "decreased" the number of such requests;
  - One respondent (8%) indicated that the Principles "greatly decreased" the number of such requests;
  - Four respondents (31%) indicated "no effect" on the number of requests.

- A majority (62%) of respondents indicated that the Principles had a positive (decrease) effect on the number of requests for discovery of another party's ESI preservation and collection efforts; more than nine out of ten respondents (93%) indicated that the effect was either positive or neutral.

e. Counsel's ability to zealously represent the litigants

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Greatly Increased	1	7.7	7.7	7.7
	Increased	4	30.8	30.8	38.5
	No Effect	8	61.5	61.5	100.0
	Total	13	100.0	100.0	

- All respondents (13) answered this question:
  - One respondent (8%) indicated that the Principles "greatly increased" the ability to zealously represent the client;
  - Four respondent (31%) indicated that the Principles "increased" the ability to zealously represent;
  - Eight respondents (62%) indicated "no effect" on the ability to zealously represent.

- No respondents (0%) indicated that application of the Principles "decreased" or "greatly decreased" counsel's ability to zealously represent the litigants.

- 39% of respondents indicated that the Principles had a positive effect on counsel's ability to zealously represent the litigants; all respondents (100%) indicated either a positive or neutral effect.

8. Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the following:

	Greatly Increased	Increased	No Effect	Decreased	Greatly Decreased
a. Counsel's demonstrated level of attention to the technologies affecting the discovery process	☐	☐	☐	☐	☐
b. Your level of attention to the technologies affecting the discovery process	☐	☐	☐	☐	☐
c. Counsel's demonstrated familiarity with their clients' electronic data and data systems	☐	☐	☐	☐	☐
d. Your understanding of the parties' electronic data and data systems for the appropriate resolution of disputes	☐	☐	☐	☐	☐

a. Counsel's demonstrated level of attention to the technologies affecting the discovery process

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Greatly Increased	3	23.1	23.1	23.1
	Increased	9	69.2	69.2	92.3
	No Effect	1	7.7	7.7	100.0
	Total	13	100.0	100.0	

- All respondents (13) answered this question:
  - Three respondents (23%) indicated that the Principles "greatly increased" counsel's level of attention to technologies affecting discovery;
  - Nine respondent (70%) indicated that the Principles "increased" counsel's level of attention to relevant technologies;
  - One respondent (8%) indicated "no effect" on the level of attention to relevant technologies.

- No respondents (0%) indicated that application of the Principles "decreased" or "greatly decreased" counsel's demonstrated level of attention to the technologies affecting the discovery process.

- More than nine out of ten respondents (93%) indicated that the Principles had a positive effect on counsel's demonstrated level of attention to the technologies affecting the discovery process; all respondents (100%) indicated either a positive or neutral effect.

b. Your level of attention to the technologies affecting the discovery process

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Greatly Increased	1	7.7	7.7	7.7
	Increased	8	61.5	61.5	69.2
	No Effect	4	30.8	30.8	100.0
	Total	13	100.0	100.0	

- All respondents (13) answered this question:
  - One respondent (8%) indicated that the Principles "greatly increased" the respondent's level of attention to technologies affecting discovery;
  - Eight respondent (62%) indicated that the Principles "increased" their level of attention to relevant technologies;
  - Four respondents (31%) indicated "no effect" on the level of attention to relevant technologies.

- No respondents (0%) indicated that application of the Principles "decreased" or "greatly decreased" the respondent's own level of attention to the technologies affecting the discovery process

- More than two-thirds of respondents (70%) indicated that the Principles had a positive effect on the respondent's own level of attention to the technologies affecting the discovery process; all respondents (100%) indicated either a positive or neutral effect.

c. Counsel's demonstrated familiarity with their clients' electronic data and data systems

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Greatly Increased	1	7.7	8.3	8.3
	Increased	10	76.9	83.3	91.7
	No Effect	1	7.7	8.3	100.0
	Total	12	92.3	99.9	
	Missing System	1	7.7		
	Total	13	100.0		

- One respondent (8% of total respondents) declined to answer the question.

- Of those who provided an answer (12):
  - One respondent (8%) indicated that the Principles "greatly increased" counsel's familiarity with their clients' electronic data and data systems;
  - Ten respondent (83%) indicated that the Principles "increased" counsel's familiarity;
  - One respondent (8%) indicated "no effect" on counsel's familiarity

- No respondents (0%) indicated that application of the Principles "decreased" or "greatly decreased" counsel's demonstrated familiarity with their clients' electronic data and data systems.

- More than one in ten respondents (91%) indicated that the Principles had a positive effect on counsel's demonstrated familiarity with their clients' electronic data and data systems; all respondents (100%) indicated either a positive or neutral effect.

d. Your understanding of the parties' electronic data and data systems for the appropriate resolution of disputes

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Greatly Increased	2	15.4	15.4	15.4
	Increased	9	69.2	69.2	84.6
	No Effect	2	15.4	15.4	100.0
	Total	13	100.0	100.0	

- All respondents (13) answered this question:
  - Two respondents (15%) indicated that the Principles "greatly increased" the respondent's own understanding of the relevant electronic data and data systems;
  - Nine respondents (70%) indicated that the Principles "increased" their understanding;
  - Two respondents (15%) indicated that the Principles had "no effect" on their understanding.

- No respondents (0%) indicated that application of the Principles "decreased" or "greatly decreased" the respondent's own understanding of the parties' electronic data and data systems.

- A solid majority of respondents (85%) indicated that the Principles had a positive effect on the respondent's own understanding of the parties' electronic data and data systems for the appropriate resolution of disputes; all respondents (100%) indicated either a positive or neutral effect.

9. Please indicate your level of agreement with the following statement, as it relates to your Pilot Program cases.

	Strongly Agree	Agree	Disagree	Strongly Disagree	N/A
a. The involvement of e-discovery liaison(s) has contributed to a more efficient discovery process.	□	□	□	□	□

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Agree	7	53.8	53.8	53.8
	Strongly Agree	6	46.2	46.2	100.0
	Total	13	100.0	100.0	

- All respondents (13) answered this question:
  - Six respondents (46%) indicated strong agreement that the liaison(s) contributed to more efficient discovery;
  - Seven respondents (54%) indicated agreement.

- No respondents (0%) disagreed or strongly disagreed with the statement that the involvement of e-discovery liaison(s) has contributed to a more efficient discovery process.

- All respondents (100%) expressed some level of agreement that the involvement of e-discovery liaisons in pilot program cases has contributed to a more efficient discovery process.

10. Did the Principles work better in some cases than in others?

- Yes
- No
- N/A

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	1	7.7	7.7	7.7
	Not Applicable	3	23.1	23.1	30.8
	Yes	9	69.2	69.2	100.0
	Total	13	100.0	100.0	

- All respondents (13) answered this question:
  - Nine respondents (70%) indicated that the Principles work better in some cases than in others, while one respondent (8%) indicated that they do not.
  - Three respondents (23%) answered "not applicable" to the question of whether the Principles work better in some cases than in others, which would indicate that these respondents did not have multiple pilot program cases.

- Of the 10 respondents who expressed an opinion on the issue, a strong majority (90%) indicated that the Principles had varying rates of success in different cases.

11. If you answered "yes" to Question 10, please use the space below to explain why you believe the Principles had varying rates of success in different cases. What factors influenced their efficacy from case to case?

_____

_____

		Frequency	Percent
Valid	*NO RESPONSE*	3	23.1
	Complexity and resources of case.	1	7.7
	Familiarity of individual counsel with the E discovery process & governing rules and ability to effectively compromise. We believe that on a long term basis, application of the principles will decrease the number of disputes (and in particularly petty disputes) that require court attention.	1	7.7
	I think in cases where each side is sophisticated and/or each side has substantial ESI collections, the parties seem already to have been working out ESI matters. The Principles have the most effect for those lawyers/clients who are not familiar with ESI issues, and on "asymmetrical" cases where one side has a substantial ESI collection and the other does not.	1	7.7
	Some cases have more inherent ESI problems than others due to the nature of the parties' allegations and the nature and availability of the relevant ESI.	1	7.7
	Some cases, such as civil rights cases against municipalities, historically have involved very little ESI. It's possible that will change as records become more automated.	1	7.7
	The amount/degree of e-discovery in the case had an impact of the success of the principles.	1	7.7
	The principles are the most effective in cases that are referred at the beginning of discovery.	1	7.7
	Too early to tell.	1	7.7
	Too soon to tell, because I have had motions to dismiss pending and not much discovery has gone forward yet.	1	7.7
	Whether the entity has access to an effective IT person; whether the attorneys were able to translate their needs to the IT person.	1	7.7
	Total	13	100.0

- Ten respondents provided a response to this question, although only nine answered "yes" to Question 10. Therefore, one respondent commented despite an indication of only one pilot program case or a belief that the Principles do not have varying rates of success in different cases.

- Of those who commented (10), eight respondents (80%) provided an answer to the question and two respondents (20%) indicated that it is too early to tell.

12. Which aspects of the Pilot Program Principles are the most useful?

_____

_____

		Frequency	Percent
Valid	*NO RESPONSE*	1	7.7
	2.01 - the duty to meet and confer. Requiring early discussion and agreement on ESI, which, if necessary, fleshes out unavoidable e-discovery issues / disputes earlier in the discovery process.	1	7.7
	Ability to generate agreements.	1	7.7
	Any time parties are directed to cooperate helps the discovery process.	1	7.7
	Designating liaison is the single best idea--it helps focus the discovery requests.	1	7.7
	For a person experienced and skilled in ESI issues, I believe the most useful aspects are early case assessment requirements, the reasonableness requirements of the preservation requests and obligations, and the liaison provision. For the unsophisticated, the education aspect may be most useful and should be emphasized.	1	7.7
	In my opinion, the most useful aspect of the Principles is to give the parties a sense of the Court's expectations at the very outset of the case. It focuses their attention right from the start on e-discovery, lets them know that we expect cooperation and involvement of advisers and experts, and gives them comfort (I think) that we've thought through these issues and they can expect quick, fair, and efficient rulings based on the Principles.	1	7.7
	Liaison	1	7.7
	Proportionality is a key concept that will help the lawyers keep their eyes on the ball. Also, the specific listing about what elements of ESI are presumptively not reasonably accessible and thus not subject to discovery.	1	7.7
	Requirement to talk early and often.	1	7.7
	Requiring the parties to meet in advance and to discuss the "technical" aspects of e-discovery.	1	7.7
	The meet and confer with the specialist and the discussion regarding proportionality.	1	7.7
	The requirement to designate an e-discovery liaison is a great innovation. It will assist both the attorneys and the court in the event of a dispute. Additionally, the fact that the Principles reflect the perspective of in house counsel as well as litigation counsel is extremely valuable.	1	7.7
	The role of the e-discovery liaison; the preservation section	7.7	7.7
	Total	13	100.0

- 12 respondents (92%) provided a response on the most useful aspects of the Principles, while one respondent (8%) declined to comment.

13. How could the Pilot Program Principles be improved?

_____

_____

		Frequency	Percent
Valid	*NO RESPONSE*	4	30.8
	Further experience may suggest some improvement. I can't think of one now.	1	7.7
	I believe the Principles are very good as they are, but I guess could be improved by incorporating the improvements suggested by the various counsel who respond to this survey.	1	7.7
	More specific directions	1	7.7
	Numerous litigants have requested model agreements - it might be helpful if those were available through the court's website as a starting point for discussion.	1	7.7
	Perhaps some more attention should be paid to the role of metadata, and whether it should be presumptively non-discoverable.	1	7.7
	The standing order should be a separate document	1	7.7
	Too early to tell	1	7.7
	Too early to tell.	1	7.7
	Too soon to tell, from my limited experience thus far.	1	7.7
	Total	13	100.0

- Nine respondents (69%) provided a response, while four respondents (31%) declined to comment.

- Of those who commented (9):
  - Five (56%) provided feedback on the Principles;
  - Four (44%) did not provide feedback on the Principles.

PART II: EVALUATION OF THE PRINCIPLES BY RESPONDENT GROUP

Question 6a: Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the level of cooperation exhibited by counsel to efficiently resolve the case.

RESPONSES BY NUMBER OF PREVIOUS E-DISCOVERY CASES

PREVIOUS E-DISCOVERY CASES	RESPONSE TO QUESTION 6a		Frequency	Percent	Valid Percent	Cumulative Percent
3-5 cases	Valid	Greatly Increased	1	33.3	33.3	33.3
		No Effect	2	66.7	66.7	100.0
		Total	3	100.0	100.0	
6-10 cases	Valid	Increased	4	100.0	100.0	100.0
11-20 cases	Valid	Greatly Increased	2	66.7	66.7	66.7
		Increased	1	33.3	33.3	100.0
		Total	3	100.0	100.0	
More than 20 cases	Valid	Greatly Increased	1	33.3	33.3	33.3
		Increased	2	66.7	66.7	100.0
		Total	3	100.0	100.0	

- Reported effect of the Principles on the level of counsel's cooperation, answers separated by the number of previous e-discovery cases handled by the respondent:
  - NO EFFECT – 67% 3-5 cases; 0% 6-10 cases; 0% 11-20 cases; 0% more than 20 cases;
  - INCREASED (to any extent) – 33% 3-5 cases; 100% 6-10 cases; 100% 11-20 cases; 100% more than 20 cases;
  - DECREASED (to any extent) – 0% 3-5 cases; 0% 6-10 cases; 0% 11-20 cases; 0% more than 20 cases.

RESPONSES BY FAMILIARITY WITH THE PRINCIPLES

LEVEL OF FAMILIARITY	RESPONSE TO QUESTION 6a		Frequency	Percent	Valid Percent	Cumulative Percent
Familiarity not indicated	Valid	Greatly Increased	1	50.0	50.0	50.0
		Increased	1	50.0	50.0	100.0
		Total	2	100.0	100.0	
3	Valid	No Effect	2	100.0	100.0	100.0
4	Valid	Increased	3	100.0	100.0	100.0
5 (Very Familiar)	Valid	Greatly Increased	3	50.0	50.0	50.0
		Increased	3	50.0	50.0	100.0
		Total	6	100.0	100.0	

- Reported effect of the Principles on the level of counsel's cooperation, answers separated by the respondent's level of familiarity with the Principles:
  - NO EFFECT – 100% level 3; 0% level 4; 0% level 5;

- INCREASED (to any extent) – 0% level 3; 100% level 4; 100% level 5;
- DECREASED (to any extent) – 0% level 3; 0% level 4; 0% level

Question 6b: Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the likelihood of an agreement on procedures for handling inadvertent disclosure of privileged information or work product under FRE 502.

RESPONSES BY NUMBER OF PREVIOUS E-DISCOVERY CASES

PREVIOUS E-DISCOVERY CASES	RESPONSE TO QUESTION 6b		Frequency	Percent	Valid Percent	Cumulative Percent
3-5 cases	Valid	Greatly Increased	1	33.3	33.3	33.3
		Increased	2	66.7	66.7	100.0
		Total	3	100.0	100.0	
6-10 cases	Valid	Greatly Increased	1	25.0	25.0	25.0
		Increased	3	75.0	75.0	100.0
		Total	4	100.0	100.0	
11-20 cases	Valid	Greatly Increased	2	66.7	66.7	66.7
		Increased	1	33.3	33.3	100.0
		Total	3	100.0	100.0	
More than 20 cases	Valid	Greatly Increased	2	66.7	66.7	66.7
		No Effect	1	33.3	33.3	100.0
		Total	3	100.0	100.0	

- Reported effect of the Principles on the likelihood of an agreement under FRE 502, answers separated by the number of previous e-discovery cases handled by the respondent:
  - NO EFFECT – 0% 3-5 cases; 0% 6-10 cases; 0% 11-20 cases; 33% more than 20 cases;
  - INCREASED (to any extent) – 100% 3-5 cases; 100% 6-10 cases; 100% 11-20 cases; 67% more than 20 cases;
  - DECREASED (to any extent) – 0% 3-5 cases; 0% 6-10 cases; 0% 11-20 cases; 81% more than 20 cases.

RESPONSES BY FAMILIARITY WITH THE PRINCIPLES

LEVEL OF FAMILIARITY		RESPONSE TO QUESTION 6b	Frequency	Percent	Valid Percent	Cumulative Percent
Familiarity not indicated	Valid	Greatly Increased	1	50.0	50.0	50.0
		Increased	1	50.0	50.0	100.0
		Total	2	100.0	100.0	
3	Valid	Increased	2	100.0	100.0	100.0
4	Valid	Increased	3	100.0	100.0	100.0
5 (Very Familiar)	Valid	Greatly Increased	5	83.3	83.3	83.3
		No Effect	1	16.7	16.7	100.0
		Total	6	100.0	100.0	

- Reported effect of the Principles on the likelihood of an agreement under FRE 502, answers separated by the respondent's level of familiarity with the Principles:
  - NO EFFECT – 0% level 3; 0% level 4; 17% level 5;
  - INCREASED (to any extent) – 100% level 3; 100% level 4; 0% level 5;
  - DECREASED (to any extent) – 0% level 3; 0% level 4; 83% level 5.

Question 6c: Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the extent to which counsel meaningfully attempt to resolve discovery disputes before seeking court intervention.

RESPONSES BY NUMBER OF PREVIOUS E-DISCOVERY CASES

PREVIOUS E-DISCOVERY CASES	RESPONSE TO QUESTION 6c		Frequency	Percent	Valid Percent	Cumulative Percent
3-5 cases	Valid	Greatly Increased	1	33.3	33.3	33.3
		Increased	1	33.3	33.3	66.7
		No Effect	1	33.3	33.3	100.0
		Total	3	100.0	100.0	
6-10 cases	Valid	Increased	4	100.0	100.0	100.0
11-20 cases	Valid	Greatly Increased	3	100.0	100.0	100.0
More than 20 cases	Valid	Greatly Increased	2	66.7	66.7	66.7
		Increased	1	33.3	33.3	100.0
		Total	3	100.0	100.0	

- Reported effect of the Principles on the extent to which counsel attempt to resolve discovery disputes without court intervention, answers separated by the number of previous e-discovery cases handled by the respondent:
  - NO EFFECT – 33% 3-5 cases; 0% 6-10 cases; 0% 11-20 cases; 0% more than 20 cases;
  - INCREASED (to any extent) – 67% 3-5 cases; 100% 6-10 cases; 100% 11-20 cases; 100% more than 20 cases;
  - DECREASED (to any extent) – 0% 3-5 cases; 0% 6-10 cases; 0% 11-20 cases; 0% more than 20 cases.

RESPONSES BY FAMILIARITY WITH THE PRINCIPLES

LEVEL OF FAMILIARITY	RESPONSE TO QUESTION 6c		Frequency	Percent	Valid Percent	Cumulative Percent
Familiarity not indicated	Valid	Greatly Increased	1	50.0	50.0	50.0
		Increased	1	50.0	50.0	100.0
		Total	2	100.0	100.0	
3	Valid	Increased	1	50.0	50.0	50.0
		No Effect	1	50.0	50.0	100.0
		Total	2	100.0	100.0	
4	Valid	Greatly Increased	1	33.3	33.3	33.3
		Increased	2	66.7	66.7	100.0
		Total	3	100.0	100.0	
5 (Very Familiar)	Valid	Greatly Increased	4	66.7	66.7	66.7
		Increased	2	33.3	33.3	100.0
		Total	6	100.0	100.0	

- Reported effect of the Principles on the extent to which counsel attempt to resolve discovery disputes without court intervention, answers separated by the respondent's level of familiarity with the Principles:
  - NO EFFECT – 50% level 3; 0% level 4; 0% level 5;
  - INCREASED (to any extent) – 50% level 3; 100% level 4; 100% level 5;
  - DECREASED (to any extent) – 0% level 3; 0% level 4; 0% level 5.

Question 6d: Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the promptness with which unresolved discovery disputes are brought to the court's attention.

RESPONSES BY NUMBER OF PREVIOUS E-DISCOVERY CASES

PREVIOUS E-DISCOVERY CASES	RESPONSE TO QUESTION 6d		Frequency	Percent	Valid Percent	Cumulative Percent
3-5 cases	Valid	Increased	2	66.7	66.7	66.7
		No Effect	1	33.3	33.3	100.0
		Total	3	100.0	100.0	
6-10 cases	Valid	Increased	1	25.0	25.0	25.0
		No Effect	3	75.0	75.0	100.0
		Total	4	100.0	100.0	
11-20 cases	Valid	Greatly Increased	1	33.3	33.3	33.3
		Increased	2	66.7	66.7	100.0
		Total	3	100.0	100.0	
More than 20 cases	Valid	Greatly Increased	1	33.3	33.3	33.3
		Increased	1	33.3	33.3	66.7
		No Effect	1	33.3	33.3	100.0
		Total	3	100.0	100.0	

- Reported effect of the Principles on the promptness with which unresolved discovery disputes are raised with the court, answers separated by the number of previous e-discovery cases handled by the respondent:
  - NO EFFECT – 33% 3-5 cases; 75% 6-10 cases; 0% 11-20 cases; 33% more than 20 cases;
  - INCREASED (to any extent) – 67% 3-5 cases; 25% 6-10 cases; 100% 11-20 cases; 67% more than 20 cases;
  - DECREASED (to any extent) – 0% 3-5 cases; 0% 6-10 cases; 0% 11-20 cases; 0% more than 20 cases.

RESPONSES BY FAMILIARITY WITH THE PRINCIPLES

LEVEL OF FAMILIARITY	RESPONSE TO QUESTION 6d		Frequency	Percent	Valid Percent	Cumulative Percent
Familiarity not indicated	Valid	Increased	1	50.0	50.0	50.0
		No Effect	1	50.0	50.0	100.0
		Total	2	100.0	100.0	
3	Valid	Increased	1	50.0	50.0	50.0
		No Effect	1	50.0	50.0	100.0
		Total	2	100.0	100.0	
4	Valid	Increased	1	33.3	33.3	33.3
		No Effect	2	66.7	66.7	100.0
		Total	3	100.0	100.0	
5 (Very Familiar)	Valid	Greatly Increased	2	33.3	33.3	33.3
		Increased	3	50.0	50.0	83.3
		No Effect	1	16.7	16.7	100.0
		Total	6	100.0	100.0	

- Reported effect of the Principles on the promptness with which unresolved discovery disputes are raised with the court, answers separated by the respondent's level of familiarity with the Principles:
  - NO EFFECT – 50% level 3; 67% level 4; 17% level 5;
  - INCREASED (to any extent) – 50% level 3; 33% level 4; 83% level 5;
  - DECREASED (to any extent) – 0% level 3; 0% level 4; 0% level 5.

Question 6e: Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the parties' ability to obtain relevant documents.

RESPONSES BY NUMBER OF PREVIOUS E-DISCOVERY CASES

PREVIOUS E-DISCOVERY CASES	RESPONSE TO QUESTION 6e		Frequency	Percent	Valid Percent	Cumulative Percent
3-5 cases	Valid	Increased	3	100.0	100.0	100.0
6-10 cases	Valid	Increased	2	50.0	50.0	50.0
		No Effect	2	50.0	50.0	100.0
		Total	4	100.0	100.0	
11-20 cases	Valid	Greatly Increased	1	33.3	33.3	33.3
		Increased	1	33.3	33.3	66.7
		No Effect	1	33.3	33.3	100.0
		Total	3	100.0	100.0	
More than 20 cases	Valid	Increased	2	66.7	66.7	66.7
		No Effect	1	33.3	33.3	100.0
		Total	3	100.0	100.0	

- Reported effect of the Principles on the parties' ability to obtain relevant documents, answers separated by the number of previous e-discovery cases handled by the respondent:
  - NO EFFECT – 0% 3-5 cases; 50% 6-10 cases; 33% 11-20 cases; 33% more than 20 cases;
  - INCREASED (to any extent) – 100% 3-5 cases; 50% 6-10 cases; 67% 11-20 cases; 67% more than 20 cases;
  - DECREASED (to any extent) – 0% 3-5 cases; 0% 6-10 cases; 0% 11-20 cases; 0% more than 20 cases.

RESPONSES BY FAMILIARITY WITH THE PRINCIPLES

LEVEL OF FAMILIARITY	RESPONSE TO QUESTION 6e		Frequency	Percent	Valid Percent	Cumulative Percent
Familiarity not indicated	Valid	Increased	2	100.0	100.0	100.0
3	Valid	Increased	2	100.0	100.0	100.0
4	Valid	Increased	1	33.3	33.3	33.3
		No Effect	2	66.7	66.7	100.0
		Total	3	100.0	100.0	
5	Valid	Greatly Increased	1	16.7	16.7	16.7
(Very Familiar)		Increased	3	50.0	50.0	66.7
		No Effect	2	33.3	33.3	100.0
		Total	6	100.0	100.0	

- Reported effect of the Principles on the parties' ability to obtain relevant documents, answers separated by the respondent's level of familiarity with the Principles:
  - NO EFFECT – 0% level 3; 67% level 4; 33% level 5;
  - INCREASED (to any extent) – 100% level 3; 33% level 4; 67% level 5;
  - DECREASED (to any extent) – 0% level 3; 0% level 4; 0% level 5.

Question 6f: Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the number of allegations of spoliation or other sanctionable misconduct.

RESPONSES BY NUMBER OF PREVIOUS E-DISCOVERY CASES

PREVIOUS E-DISCOVERY CASES	RESPONSE TO QUESTION 6f		Frequency	Percent	Valid Percent	Cumulative Percent
3-5 cases	Valid	Decreased	1	33.3	33.3	33.3
		No Effect	2	66.7	66.7	100.0
		Total	3	100.0	100.0	
6-10 cases	Valid	No Effect	4	100.0	100.0	100.0
11-20 cases	Valid	Decreased	1	33.3	33.3	33.3
		Greatly Decreased	1	33.3	33.3	66.7
		No Effect	1	33.3	33.3	100.0
		Total	3	100.0	100.0	
More than 20 cases	Valid	Decreased	2	66.7	66.7	66.7
		No Effect	1	33.3	33.3	100.0
		Total	3	100.0	100.0	

- Reported effect of the Principles on the number of allegations of sanctionable misconduct, answers separated by the number of previous e-discovery cases handled by the respondent:
  - NO EFFECT – 67% 3-5 cases; 100% 6-10 cases; 33% 11-20 cases; 33% more than 20 cases;
  - INCREASED (to any extent) – 0% 3-5 cases; 0% 6-10 cases; 67% 11-20 cases; 0% more than 20 cases;
  - DECREASED (to any extent) – 33% 3-5 cases; 0% 6-10 cases; 0% 11-20 cases; 67% more than 20 cases.

RESPONSES BY FAMILIARITY WITH THE PRINCIPLES

LEVEL OF FAMILIARITY	RESPONSE TO QUESTION 6f		Frequency	Percent	Valid Percent	Cumulative Percent
Familiarity not indicated	Valid	Decreased	1	50.0	50.0	50.0
		No Effect	1	50.0	50.0	100.0
		Total	2	100.0	100.0	
3	Valid	No Effect	2	100.0	100.0	100.0
4	Valid	No Effect	3	100.0	100.0	100.0
5 (Very Familiar)	Valid	Decreased	3	50.0	50.0	50.0
		Greatly Decreased	1	16.7	16.7	66.7
		No Effect	2	33.3	33.3	100.0
		Total	6	100.0	100.0	

- Reported effect of the Principles on the number of allegations of sanctionable misconduct, answers separated by the respondent's level of familiarity with the Principles:
  - NO EFFECT – 100% level 3; 100% level 4; 33% level 5;
  - INCREASED (to any extent) – 0% level 3; 0% level 4; 0% level 5;
  - DECREASED (to any extent) – 0% level 3; 0% level 4; 67% level 5.

Question 7a: Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the following: length of the discovery period.

RESPONSES BY NUMBER OF PREVIOUS E-DISCOVERY CASES

PREVIOUS E-DISCOVERY CASES	RESPONSE TO QUESTION 7a		Frequency	Percent	Valid Percent	Cumulative Percent
3-5 cases	Valid	Decreased	1	33.3	33.3	33.3
		No Effect	2	66.7	66.7	100.0
		Total	3	100.0	100.0	
6-10 cases	Valid	No Effect	4	100.0	100.0	100.0
11-20 cases	Valid	Decreased	1	33.3	33.3	33.3
		No Effect	2	66.7	66.7	100.0
		Total	3	100.0	100.0	
More than 20 cases	Valid	Decreased	2	66.7	66.7	66.7
		No Effect	1	33.3	33.3	100.0
		Total	3	100.0	100.0	

- Reported effect of the Principles on the length of discovery, answers separated by the number of previous e-discovery cases handled by the respondent:
  - NO EFFECT – 67% 3-5 cases; 100% 6-10 cases; 67% 11-20 cases; 33% more than 20 cases;
  - INCREASED (to any extent) – 0% 3-5 cases; 0% 6-10 cases; 0% 11-20 cases; 0% more than 20 cases;
  - DECREASED (to any extent) – 33% 3-5 cases; 0% 6-10 cases; 33% 11-20 cases; 67% more than 20 cases.

RESPONSES BY FAMILIARITY WITH THE PRINCIPLES

LEVEL OF FAMILIARITY	RESPONSE TO QUESTION 7a		Frequency	Percent	Valid Percent	Cumulative Percent
Familiarity not indicated	Valid	Decreased	1	50.0	50.0	50.0
		No Effect	1	50.0	50.0	100.0
		Total	2	100.0	100.0	
3	Valid	No Effect	2	100.0	100.0	100.0
4	Valid	Decreased	1	33.3	33.3	33.3
		No Effect	2	66.7	66.7	100.0
		Total	3	100.0	100.0	
5 (Very Familiar)	Valid	Decreased	2	33.3	33.3	33.3
		No Effect	4	66.7	66.7	100.0
		Total	6	100.0	100.0	

- Reported effect of the Principles on the length of discovery, answers separated by the respondent's level of familiarity with the Principles:
  - NO EFFECT – 50% level 3; 67% level 4; 67% level 5;
  - INCREASED (to any extent) – 0% level 3; 0% level 4; 0% level 5;
  - DECREASED (to any extent) – 50% level 3; 33% level 4; 33% level 5.

Question 7b: Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the following: length of the litigation.

RESPONSES BY NUMBER OF PREVIOUS E-DISCOVERY CASES

PREVIOUS E-DISCOVERY CASES	RESPONSE TO QUESTION 7b		Frequency	Percent	Valid Percent	Cumulative Percent
3-5 cases	Valid	Decreased	1	33.3	33.3	33.3
		No Effect	2	66.7	66.7	100.0
		Total	3	100.0	100.0	
6-10 cases	Valid	No Effect	4	100.0	100.0	100.0
11-20 cases	Valid	Decreased	1	33.3	33.3	33.3
		No Effect	2	66.7	66.7	100.0
		Total	3	100.0	100.0	
More than 20 cases	Valid	Decreased	2	66.7	66.7	66.7
		No Effect	1	33.3	33.3	100.0
		Total	3	100.0	100.0	

- Reported effect of the Principles on the length of the litigation, answers separated by the number of previous e-discovery cases handled by the respondent:
  - NO EFFECT – 67% 3-5 cases; 100% 6-10 cases; 67% 11-20 cases; 33% more than 20 cases;
  - INCREASED (to any extent) –0% 3-5 cases; 0% 6-10 cases; 0% 11-20 cases; 0% more than 20 cases;
  - DECREASED (to any extent) – 33% 3-5 cases; 0% 6-10 cases; 33% 11-20 cases; 67% more than 20 cases.

RESPONSES BY FAMILIARITY WITH THE PRINCIPLES

LEVEL OF FAMILIARITY	RESPONSE TO QUESTION 7b		Frequency	Percent	Valid Percent	Cumulative Percent
Familiarity not indicated	Valid	Decreased	1	50.0	50.0	50.0
		No Effect	1	50.0	50.0	100.0
		Total	2	100.0	100.0	
3	Valid	No Effect	2	100.0	100.0	100.0
4	Valid	Decreased	1	33.3	33.3	33.3
		No Effect	2	66.7	66.7	100.0
		Total	3	100.0	100.0	
5 (Very Familiar)	Valid	Decreased	2	33.3	33.3	33.3
		No Effect	4	66.7	66.7	100.0
		Total	6	100.0	100.0	

- Reported effect of the Principles on the length of the litigation, answers separated by the respondent's level of familiarity with the Principles:
  - NO EFFECT – 100% level 3; 67% level 4; 67% level 5;
  - INCREASED (to any extent) – 0% level 3; 0% level 4; 0% level 5;
  - DECREASED (to any extent) – 0% level 3; 33% level 4; 33% level 5.

Question 7c: Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the following: number of discovery disputes brought before the court.

RESPONSES BY NUMBER OF PREVIOUS E-DISCOVERY CASES

PREVIOUS E-DISCOVERY CASES	RESPONSE TO QUESTION 7c		Frequency	Percent	Valid Percent	Cumulative Percent
3-5 cases	Valid	Decreased	3	100.0	100.0	100.0
6-10 cases	Valid	Decreased	2	50.0	50.0	50.0
		Increased	1	25.0	25.0	75.0
		No Effect	1	25.0	25.0	100.0
		Total	4	100.0	100.0	
11-20 cases	Valid	Decreased	2	66.7	66.7	66.7
		Greatly Decreased	1	33.0	33.3	100.0
		Total	100.0	100.0	100.0	
More than 20 cases	Valid	Decreased	100.0	100.0	100.0	100.0

- Reported effect of the Principles on the number of discovery disputes brought before the court, answers separated by the number of previous e-discovery cases handled by the respondent:
  - NO EFFECT – 0% 3-5 cases; 25% 6-10 cases; 0% 11-20 cases; 0% more than 20 cases;
  - INCREASED (to any extent) – 0% 3-5 cases; 25% 6-10 cases; 0% 11-20 cases; 0% more than 20 cases;
  - DECREASED (to any extent) – 100% 3-5 cases; 50% 6-10 cases; 100% 11-20 cases; 100% more than 20 cases.

RESPONSES BY FAMILIARITY WITH THE PRINCIPLES

LEVEL OF FAMILIARITY	RESPONSE TO QUESTION 7c		Frequency	Percent	Valid Percent	Cumulative Percent
Familiarity not indicated	Valid	Decreased	2	100.0	100.0	100.0
3	Valid	Decreased	2	100.0	100.0	100.0
4	Valid	Decreased	2	66.7	66.7	66.7
		Increased	1	33.3	33.3	100.0
		Total	3	100.0	100.0	
5 (Very Familiar)	Valid	Decreased	4	66.7	66.7	66.7
		Greatly Decreased	1	16.7	16.7	83.3
		No Effect	1	16.7	16.7	100.0
		Total	6	100.0	100.0	

- Reported effect of the Principles on the number of discovery disputes brought before the court, answers separated by the respondent's level of familiarity with the Principles:
  - NO EFFECT – 0% level 3; 0% level 4; 17% level 5;
  - INCREASED (to any extent) – 0% level 3; 33% level 4; 0% level 5;
  - DECREASED (to any extent) – 100% level 3; 67% level 4; 83% level 5.

Question 7d: Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the following: number of requests for discovery of another party's efforts to preserve or collect ESI.

RESPONSES BY NUMBER OF PREVIOUS E-DISCOVERY CASES

PREVIOUS E-DISCOVERY CASES	RESPONSE TO QUESTION 7d		Frequency	Percent	Valid Percent	Cumulative Percent
3-5 cases	Valid	Decreased	3	100.0	100.0	100.0
6-10 cases	Valid	Decreased	1	25.0	25.0	25.0
		No Effect	3	75.0	75.0	100.0
		Total	4	100.0	100.0	
11-20 cases	Valid	Decreased	2	66.7	66.7	66.7
		Greatly Decreased	1	33.3	33.3	100.0
		Total	3	100.0	100.0	
More than 20 cases	Valid	Decreased	1	33.3	33.3	33.3
		Increased	1	33.3	33.3	66.7
		No Effect	1	33.3	33.3	100.0
		Total	3	100.0	100.0	

- Reported effect of the Principles on the number of requests for discovery of preservation or collection efforts, answers separated by the number of previous e-discovery cases handled by the respondent:
  - NO EFFECT – 0% 3-5 cases; 75% 6-10 cases; 0% 11-20 cases; 33% more than 20 cases;
  - INCREASED (to any extent) – 0% 3-5 cases; 0% 6-10 cases; 0% 11-20 cases; 33% more than 20 cases;
  - DECREASED (to any extent) – 100% 3-5 cases; 25% 6-10 cases; 100% 11-20 cases; 33% more than 20 cases.

RESPONSES BY FAMILIARITY WITH THE PRINCIPLES

LEVEL OF FAMILIARITY	RESPONSE TO QUESTION 7d		Frequency	Percent	Valid Percent	Cumulative Percent
Familiarity not indicated	Valid	Decreased	1	50.0	50.0	50.0
		No Effect	1	50.0	50.0	100.0
		Total	2	100.0	100.0	
3	Valid	Decreased	2	100.0	100.0	100.0
4	Valid	Decreased	2	66.7	66.7	66.7
		No Effect	1	33.3	33.3	100.0
		Total	3	100.0	100.0	
5 (Very Familiar)	Valid	Decreased	2	33.3	33.3	33.3
		Greatly Decreased	1	16.7	16.7	50.0
		Increased	1	16.7	16.7	66.7
		No Effect	2	33.3	33.3	100.0
		Total	6	100.0	100.0	

- Reported effect of the Principles on the number of requests for discovery of preservation or collection efforts, answers separated by the respondent's level of familiarity with the Principles:
  - NO EFFECT – 0% level 3; 33% level 4; 33% level 5;
  - INCREASED (to any extent) – 0% level 3; 0% level 4; 17% level 5;
  - DECREASED (to any extent) – 100% level 3; 67% level 4; 50% level 5.

Question 7e: Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the following: counsel's ability to zealously represent the litigants.

RESPONSES BY NUMBER OF PREVIOUS E-DISCOVERY CASES

PREVIOUS E-DISCOVERY CASES	RESPONSE TO QUESTION 7e		Frequency	Percent	Valid Percent	Cumulative Percent
3-5 cases	Valid	No Effect	3	100.0	100.0	100.0
6-10 cases	Valid	Increased	2	50.0	50.0	50.0
		No Effect	2	50.0	50.0	100.0
		Total	4	100.0	100.0	
11-20 cases	Valid	Greatly Increased	1	33.3	33.3	33.3
		No Effect	2	66.7	66.7	100.0
		Total	3	100.0	100.0	
More than 20 cases	Valid	Increased	2	66.7	66.7	66.7
		No Effect	1	33.3	33.3	100.0
		Total	3	100.0	100.0	

- Reported effect of the Principles on counsel's ability to zealously represent the litigants, answers separated by the number of previous e-discovery cases handled by the respondent:
  - NO EFFECT – 100% 3-5 cases; 50% 6-10 cases; 67% 11-20 cases; 33% more than 20 cases;
  - INCREASED (to any extent) – 0% 3-5 cases; 50% 6-10 cases; 33% 11-20 cases; 67% more than 20 cases;
  - DECREASED (to any extent) – 0% 3-5 cases; 0% 6-10 cases; 0% 11-20 cases; 0% more than 20 cases.

RESPONSES BY FAMILIARITY WITH THE PRINCIPLES

LEVEL OF FAMILIARITY	RESPONSE TO QUESTION 7e		Frequency	Percent	Valid Percent	Cumulative Percent
Familiarity not indicated	Valid	Increased	1	50.0	50.0	50.0
		No Effect	1	50.0	50.0	100.0
		Total	2	100.0	100.0	
3	Valid	No Effect	2	100.0	100.0	100.0
4	Valid	Increased	1	33.3	33.3	33.3
		No Effect	2	66.7	66.7	100.0
		Total	3	100.0	100.0	
5 (Very Familiar)	Valid	Greatly Increased	1	16.7	16.7	16.7
		Increased	2	33.3	33.3	50.0
		No Effect	3	50.0	50.0	100.0
		Total	6	100.0	100.0	

- Reported effect of the Principles on counsel's ability to zealously represent the litigants, answers separated by the respondent's level of familiarity with the Principles:
  - NO EFFECT – 100% level 3; 67% level 4; 50% level 5;
  - INCREASED (to any extent) – 0% level 3; 33% level 4; 50% level 5;
  - DECREASED (to any extent) – 0% level 3; 0% level 4; 0% level 5.

Question 8a: Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the following: counsel's demonstrated level of attention to the technologies affecting the discovery process.

RESPONSES BY NUMBER OF PREVIOUS E-DISCOVERY CASES

PREVIOUS E-DISCOVERY DISPUTES	RESPONSE TO QUESTION 8a		Frequency	Percent	Valid Percent	Cumulative Percent
3-5 cases	Valid	Increased	3	100.0	100.0	100.0
6-10 cases	Valid	Increased	4	100.0	100.0	100.0
11-20 cases	Valid	Greatly Increased	2	66.7	66.7	66.7
		No Effect	1	33.3	33.3	100.0
		Total	3	100.0	100.0	
More than 20 cases	Valid	Greatly Increased	1	33.3	33.3	33.3
		Increased	2	66.7	66.7	100.0
		Total	3	100.0	100.0	

- Reported effect of the Principles on counsel's level of attention to the technologies affecting discovery, answers separated by the number of previous e-discovery cases handled by the respondent:
  - NO EFFECT – 0% 3-5 cases; 0% 6-10 cases; 33% 11-20 cases; 0% more than 20 cases;
  - INCREASED (to any extent) – 100% 3-5 cases; 100% 6-10 cases; 67% 11-20 cases; 100% more than 20 cases;
  - DECREASED (to any extent) – 0% 3-5 cases; 0% 6-10 cases; 0% 11-20 cases; 0% more than 20 cases.

RESPONSES BY FAMILIARITY WITH THE PRINCIPLES

LEVEL OF FAMILIARITY	RESPONSE TO QUESTION 8a		Frequency	Percent	Valid Percent	Cumulative Percent
Familiarity not indicated	Valid	Increased	2	100.0	100.0	100.0
3	Valid	Increased	2	100.0	100.0	100.0
4	Valid	Increased	2	66.7	66.7	66.7
		No Effect	1	33.3	33.3	100.0
		Total	3	100.0	100.0	
5 (Very Familiar)	Valid	Greatly Increased	3	50.0	50.0	50.0
		Increased	3	50.0	50.0	100.0
		Total	6	100.0	100.0	

- Reported effect of the Principles on counsel's level of attention to the technologies affecting discovery, answers separated by the respondent's level of familiarity with the Principles:
  - NO EFFECT – 0% level 3; 33% level 4; 0% level 5;
  - INCREASED (to any extent) – 100% level 3; 67% level 4; 100% level 5;
  - DECREASED (to any extent) – 0% level 3; 0% level 4; 0% level 5.

Question 8b: Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the following: your level of attention to the technologies affecting the discovery process.

RESPONSES BY NUMBER OF PREVIOUS E-DISCOVERY CASES

PREVIOUS E-DISCOVERY DISPUTES	RESPONSE TO QUESTION 8b		Frequency	Percent	Valid Percent	Cumulative Percent
3-5 cases	Valid	Increased	2	66.7	66.7	66.7
		No Effect	1	33.3	33.3	100.0
		Total	3	100.0	100.0	
6-10 cases	Valid	Increased	3	75.0	75.0	75.0
		No Effect	1	25.0	25.0	100.0
		Total	4	100.0	100.0	
11-20 cases	Valid	Greatly Increased	1	33.3	33.3	33.3
		Increased	2	66.7	66.7	100.0
		Total	3	100.0	100.0	
More than 20 cases	Valid	Increased	1	33.3	33.3	33.3
		No Effect	2	66.7	66.7	100.0
		Total	3	100.0	100.0	

- Reported effect of the Principles on the respondent's own level of attention to the technologies affecting discovery, answers separated by the number of previous e-discovery cases handled by the respondent:
  - NO EFFECT – 33% 3-5 cases; 25% 6-10 cases; 0% 11-20 cases; 67% more than 20 cases;
  - INCREASED (to any extent) – 67% 3-5 cases; 100% 6-10 cases; 67% 11-20 cases; 33% more than 20 cases;
  - DECREASED (to any extent) – 0% 3-5 cases; 0% 6-10 cases; 0% 11-20 cases; 0% more than 20 cases.

RESPONSES BY FAMILIARITY WITH THE PRINCIPLES

LEVEL OF FAMILIARITY	RESPONSE TO QUESTION 8b		Frequency	Percent	Valid Percent	Cumulative Percent
Familiarity not indicated	Valid	Increased	2	100.0	100.0	100.0
3	Valid	Increased	1	50.0	50.0	50.0
		No Effect	1	50.0	50.0	100.0
		Total	2	100.0	100.0	
4	Valid	Increased	3	100.0	100.0	100.0
5	Valid	Greatly Increased	1	16.7	16.7	16.7
(Very Familiar)		Increased	2	33.3	33.3	50.0
		No Effect	3	50.0	50.0	100.0
		Total	6	100.0	100.0	

- Reported effect of the Principles on the respondent's level of familiarity with the technologies affecting discovery, answers separated by the respondent's level of familiarity with the Principles:
  - NO EFFECT – 50% level 3; 0% level 4; 50% level 5;
  - INCREASED (to any extent) – 50% level 3; 100% level 4; 50% level 5;
  - DECREASED (to any extent) – 0% level 3; 0% level 4; 0% level 5.

Question 8c: Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the following: counsel's demonstrated familiarity with their clients' electronic data and data systems.

RESPONSES BY NUMBER OF PREVIOUS E-DISCOVERY CASES

PREVIOUS E-DISCOVERY CASES	REPONSE TO QUESTION 8c		Frequency	Percent	Valid Percent	Cumulative Percent
3-5 cases	Valid	Increased	3	100.0	100.0	100.0
6-10 cases	Valid	Increased	4	100.0	100.0	100.0
11-20 cases	Valid	Greatly Increased	1	33.3	33.3	33.3
		Increased	2	66.7	66.7	100.0
		Total	3	100.0	100.0	
More than 20 cases	Valid	(No response)	1	33.3	33.3	33.3
		Increased	1	33.3	33.3	66.7
		No Effect	1	33.3	33.3	100.0
		Total	3	100.0	100.0	

- Reported effect of the Principles on counsel's familiarity with their clients' electronic data and data systems, answers separated by the number of previous e-discovery cases handled by the respondent (excluding those who declined to answer):
  - NO EFFECT – 0% 3-5 cases; 0% 6-10 cases; 0% 11-20 cases; 50% more than 20 cases;
  - INCREASED (to any extent) – 100% 3-5 cases; 100% 6-10 cases; 100% 11-20 cases; 50% more than 20 cases;
  - DECREASED (to any extent) – 0% 3-5 cases; 0% 6-10 cases; 0% 11-20 cases; 0% more than 20 cases.

RESPONSES BY FAMILIARITY WITH THE PRINCIPLES

LEVEL OF FAMILIARITY	RESPONSE TO QUESTION 8c		Frequency	Percent	Valid Percent	Cumulative Percent
Familiarity not indicated	Valid	Increased	2	100.0	100.0	100.0
3	Valid	Increased	2	100.0	100.0	100.0
4	Valid	Increased	3	100.0	100.0	100.0
5 (Very Familiar)	Valid	(No response)	1	16.7	16.7	16.7
		Greatly Increased	1	16.7	16.7	33.3
		Increased	3	50.0	50.0	83.3
		No Effect	1	16.7	16.7	100.0
		Total	6	100.0	100.0	

- Reported effect of the Principles on counsel's familiarity with their clients' electronic data and data systems, answers separated by the respondent's level of familiarity with the Principles:
  - NO EFFECT – 0% level 3; 0% level 4; 20% level 5;
  - INCREASED (to any extent) – 100% level 3; 100% level 4; 80% level 5;
  - DECREASED (to any extent) – 0% level 3; 0% level 4; 0% level 5.

Question 8d: Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the following: your understanding of the parties' electronic data and data systems for the appropriate resolution of disputes.

RESPONSES BY NUMBER OF PREVIOUS E-DISCOVERY CASES

PREVIOUS E-DISCOVERY CASES	RESPONSE TO QUESTION 8d		Frequency	Percent	Valid Percent	Cumulative Percent
3-5 cases	Valid	Increased	2	66.7	66.7	66.7
		No Effect	1	33.3	33.3	100.0
		Total	3	100.0	100.0	
6-10 cases	Valid	Increased	4	100.0	100.0	100.0
11-20 cases	Valid	Greatly Increased	1	33.3	33.3	33.3
		Increased	2	66.7	66.7	100.0
		Total	3	100.0	100.0	
More than 20 cases	Valid	Greatly Increased	1	33.3	33.3	33.3
		Increased	1	33.3	33.3	66.7
		No Effect	1	33.3	33.3	100.0
		Total	3	100.0	100.0	

- Reported effect of the Principles on the respondent's own understanding of the parties' electronic data and data systems for dispute resolution, answers separated by the number of previous e-discovery cases handled by the respondent:
  - NO EFFECT – 33% 3-5 cases; 0% 6-10 cases; 0% 11-20 cases; 33% more than 20 cases;
  - INCREASED (to any extent) – 67% 3-5 cases; 100% 6-10 cases; 100% 11-20 cases; 67% more than 20 cases;
  - DECREASED (to any extent) – 0% 3-5 cases; 0% 6-10 cases; 0% 11-20 cases; 0% more than 20 cases.

RESPONSES BY FAMILIARITY WITH THE PRINCIPLES

LEVEL OF FAMILIARITY	RESPONSE TO QUESTION 8d		Frequency	Percent	Valid Percent	Cumulative Percent
Familiarity not indicated	Valid	Increased	2	100.0	100.0	100.0
3	Valid	Increased	1	50.0	50.0	50.0
		No Effect	1	50.0	50.0	100.0
		Total	2	100.0	100.0	
4	Valid	Increased	3	100.0	100.0	100.0
5	Valid	Greatly Increased	2	33.3	33.3	33.3
(Very Familiar)		Increased	3	50.0	50.0	83.3
		No Effect	1	16.7	16.7	100.0
		Total	6	100.0	100.0	

- Reported effect of the Principles on the respondent's own understanding of the parties' electronic data and data systems for dispute resolution, answers separated by the respondent's level of familiarity with the Principles:
  - NO EFFECT – 50% level 3; 0% level 4; 17% level 5;
  - INCREASED (to any extent) – 50% level 3; 100% level 4; 83% level 5;
  - DECREASED (to any extent) – 0% level 3; 0% level 4; 0% level 5.

Question 9: Please indicate your level of agreement with the following statement, as it relates to your Pilot Program cases: The involvement of e-discovery liaison(s) has contributed to a more efficient discovery process.

RESPONSES BY NUMBER OF PREVIOUS E-DISCOVERY CASES

PREVIOUS E-DISCOVERY CASES	RESPONSE TO QUESTION 9		Frequency	Percent	Valid Percent	Cumulative Percent
3-5 cases	Valid	Agree	2	66.7	66.7	66.7
		Strongly Agree	1	33.3	33.3	100.0
		Total	3	100.0	100.0	
6-10 cases	Valid	Agree	4	100.0	100.0	100.0
11-20 cases	Valid	Strongly Agree	3	100.0	100.0	100.0
More than 20 cases	Valid	Agree	1	33.3	33.3	33.3
		Strongly Agree	2	66.7	66.7	100.0
		Total	3	100.0	100.0	

- Reaction to the statement that the involvement of e-discovery liaison(s) contributed to a more efficient discovery process, separated by the number of previous e-discovery cases handled by the respondent:
  - AGREED (to any extent) – 100% 3-5 cases; 100% 6-10 cases; 100% 11-20 cases; 100% more than 20 cases;
  - DISAGREED (to any extent) – 0% 3-5 cases; 0% 6-10 cases; 0% 11-20 cases; 0% more than 20 cases;
  - NOT APPLICABLE – 0% 3-5 cases; 0% 6-10 cases; 0% 11-20 cases; 0% more than 20 cases.

RESPONSES BY FAMILIARITY WITH THE PRINCIPLES

LEVEL OF FAMILIARITY	RESPONSE TO QUESTION 9		Frequency	Percent	Valid Percent	Cumulative Percent
Familiarity not indicated	Valid	Agree	2	100.0	100.0	100.0
3	Valid	Agree	1	50.0	50.0	50.0
		Strongly Agree	1	50.0	50.0	100.0
		Total	2	100.0	100.0	
4	Valid	Agree	2	66.7	66.7	66.7
		Strongly Agree	1	33.3	33.3	100.0
		Total	3	100.0	100.0	
5 (Very Familiar)	Valid	Agree	2	33.3	33.3	33.3
		Strongly Agree	4	66.7	66.7	100.0
		Total	6	100.0	100.0	

- Reaction to the statement that the involvement of e-discovery liaison(s) contributed to a more efficient discovery process, separated by the respondent's familiarity with the Principles:
  - AGREED (to any extent) – 100% level 3; 100% level 4; 100% level 5;
  - DISAGREED (to any extent) – 0% level 3; 0% level 4; 0% level 5;
  - NOT APLICABLE – 0% level 3; 0% level 4; 0% level 5.

F.1.b. Attorney Survey

INSTITUTE *for the* ADVANCEMENT *of the* AMERICAN LEGAL SYSTEM

UNIVERSITY OF DENVER

DATA ANALYSIS FOR THE SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM:

SURVEY OF ATTORNEYS

TABLE OF CONTENTS

PART I: AGGREGATE SURVEY RESULTS

1. Number of years you have practiced law, rounded to the nearest year:

_____

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	2	5	3.8	3.9	3.9
	3	3	2.3	2.4	6.3
	5	6	4.5	4.7	11.0
	6	5	3.8	3.9	15.0
	7	5	3.8	3.9	18.9
	8	2	1.5	1.6	20.5
	9	5	3.8	3.9	24.4
	10	7	5.3	5.5	29.9
	11	3	2.3	2.4	32.3
	12	3	2.3	2.4	34.6
	13	2	1.5	1.6	36.2
	14	2	1.5	1.6	37.8
	15	8	6.0	6.3	44.1
	16	2	1.5	1.6	45.7
	17	2	1.5	1.6	47.2
	18	3	2.3	2.4	49.6
	19	2	1.5	1.6	51.2
	20	5	3.8	3.9	55.1
	22	3	2.3	2.4	57.5
	23	3	2.3	2.4	59.8
	24	2	1.5	1.6	61.4
	25	6	4.5	4.7	66.1
	26	2	1.5	1.6	67.7
	27	1	.8	.8	68.5
	28	5	3.8	3.9	72.4
	29	3	2.3	2.4	74.8
	30	4	3.0	3.1	78.0
	31	3	2.3	2.4	80.3
	32	1	.8	.8	81.1
	33	1	.8	.8	81.9
	34	3	2.3	2.4	84.3
	35	4	3.0	3.1	87.4
	36	1	.8	.8	88.2
	37	2	1.5	1.6	89.8
	38	2	1.5	1.6	91.3
	39	2	1.5	1.6	92.9

	40	5	3.8	3.9	96.9
	45	2	1.5	1.6	98.4
	47	1	.8	.8	99.2
	53	1	.8	.8	100.0
	Total	127	95.5	100.0	
Missing	System	6	4.5		
Total		133	100.0		

- Six respondents (5% of 133 total respondents) declined to answer this question.

- Of those who provided an answer (127), no respondents (0%) have practiced law for fewer than two years; and no respondents (0%) have practiced law for more than 53 years.

- Of those who provided an answer:
  - Ten respondents (11%) have practiced law for 5 years or less;
  - 24 respondents (19%) have practiced for 6-10 years;
  - 32 respondents (25%) have practiced for 11-20 years;
  - 29 respondents (23%) have practiced for 21-30 years;
  - 28 respondents (22%) have practiced for over 30 years.

- Respondents have practiced law for an average of 20 years.

2. Your main area of practice:

- □ Bankruptcy
- □ Civil Rights
- □ Commercial Litigation – class action
- □ Commercial Litigation – not primarily class action
- □ Employment/Labor/Employee Benefits
- □ Environmental
- □ Estate Planning
- □ General Practice
- □ Government
- □ Intellectual Property
- □ Personal Injury
- □ Real Estate
- □ Tax
- □ Other: _____ (please specify)

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Civil Rights	2	1.5	1.5	1.5
	Commercial Litigation -- class action	24	18.0	18.0	19.5
	Commercial Litigation -- not primarily class action	42	31.6	31.6	51.1
	Employment/Labor/Employee Benefits	19	14.3	14.3	65.4
	General Practice	6	4.5	4.5	69.9
	Intellectual Property	21	15.8	15.8	85.7
	Personal Injury	11	8.3	8.3	93.9
	Real Estate	1	.8	.8	94.7
	OTHER (see "Other Text", below)	7	5.3	5.3	100.0
	Total	133	100.0	100.0	

Other Text

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Antitrust	2	1.5	28.6	28.6
	Business litigation	1	.8	14.3	42.9
	Criminal	2	1.5	28.6	71.4
	Insurance and municipal defense	1	.8	14.3	85.7
	International law	1	.8	14.3	100.0
	Total	7	5.3	100.0	
Missing	System	126	94.7		
Total		133	100.0		

- All respondents (133) answered this question.

- No respondents (0%) indicated the following as their main area of practice:
  - Bankruptcy;
  - Environmental;
  - Estate Planning;
  - Government; and
  - Tax.

- 96% of respondents selected from the categories provided:
  - 42 respondents (32%) selected "commercial litigation – not primarily class action";
  - 24 respondents (18%) selected "commercial litigation – class action";
  - 21 respondents (16%) selected "intellectual property";
  - 19 respondents (14%) selected "employment/labor/employee benefits";
  - 11 respondents (8%) selected "personal injury";
  - Six respondents (5%) selected "general practice";
  - Two respondents (2%) selected "civil rights"; and
  - One respondent (1%) selected "real estate".

- Seven respondents (5%) selected "other" and described the practice area. The committee will need to decide whether to classify any of the "other" responses into one of the categories provided. If this is done, the percentages will need to be re-calculated (out of a total of 133 respondents). The following are "other" categories entered by more than one respondent:
  - Two respondents (2%) practice "antitrust" law;
  - Two respondents (2%) practice "criminal" law.

In this survey, any discovery seeking information in electronic format will be referred to as "e-discovery". Electronically stored information will be referred to as "ESI".

3. NOT INCLUDING the Pilot Program case, how many of your cases in the last five years have involved e-discovery?

- 0 cases
- 1-2 cases
- 3-5 cases
- 6-10 cases
- 11-20 cases
- More than 20 cases

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	0 cases	10	7.5	7.5	7.5
	1-2 cases	21	15.8	15.8	23.3
	3-5 cases	32	24.1	24.1	47.4
	6-10 cases	25	18.8	18.8	66.2
	11-20 cases	18	13.5	13.5	79.7
	More than 20 cases	27	20.3	20.3	100.0
	Total	133	100.0	100.0	

- All respondents (133) answered this question:
  - Ten respondents (8%) have had no prior cases involving e-discovery in the last five years;
  - 21 respondents (16%) have had 1-2 prior e-discovery cases;
  - 32 respondents (24%) have had 3-5 prior e-discovery cases;
  - 25 respondents (19%) have had 6-10 prior e-discovery cases;
  - 18 respondents (14%) have had 11-20 prior e-discovery cases;
  - 27 respondents (20%) have had more than 20 prior e-discovery cases.

- 70 respondents (53%) have averaged more than one e-discovery case per year in the last five years, while 63 respondents (47%) have averaged one or fewer e-discovery cases per year in the last five years.

The Seventh Circuit's Principles for e-discovery were developed by a committee and are being tested in selected Pilot Program cases, including your Pilot Program case.

4. Please rate your current familiarity with the substance of the Principles.

Not At All Familiar	◄———	**Very Familiar**

0	1	2	3	4	5
□	□	□	□	□	□

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	0 Not At All Familiar	12	9.0	9.0	9.0
	1	17	12.8	12.8	21.8
	2	20	15.0	15.0	36.8
	3	39	29.3	29.3	66.2
	4	30	22.6	22.6	88.7
	5 Very Familiar	15	11.3	11.3	100.0
	Total	133	100.0	100.0	

- All respondents (133) answered this question:
  - 12 respondents (9%) indicated no familiarity with the substance of the Principles;
  - 17 respondents (13%) selected "1" on a scale from 0 (not at all familiar) to 5 (very familiar);
  - 20 respondents (15%) selected "2";
  - 39 respondents (29%) selected "3";
  - 30 respondents (23%) selected "4";
  - 15 respondents (11%) selected "5".

- Roughly speaking, approximately one-third of respondents (37%) have low levels of familiarity with the Principles (0-2 on the scale); one-third (29%) have a medium level of familiarity (3 on the scale); and one-third (34%) have high levels of familiarity (4-5 on the scale).

The following questions refer to your Pilot Program case. "FRCP" refers to the Federal Rules of Civil Procedure.

5. Case type:

- □ Bankruptcy
- □ Civil Rights
- □ Contract
- □ Federal Tax
- □ Forfeiture/Penalty
- □ Employment/Labor/Employee Benefits
- □ Prisoner Petition
- □ Property Rights (copyright, patent, trademark)
- □ Real Property
- □ Social Security
- □ Torts (personal injury)
- □ Torts (personal property)
- □ Other: _____ (please specify)

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Bankruptcy	2	1.5	1.5	1.5
	Civil Rights	5	3.8	3.9	5.4
	Contract	18	13.5	13.8	19.2
	Employment/Labor/Employee Benefits	28	21.1	21.5	40.7
	Property Rights (copyright, patent, trademark)	20	15.0	15.4	56.1
	Real Property	2	1.5	1.5	57.6
	Torts (personal injury)	7	5.3	5.4	63.0
	Torts (personal property)	5	3.8	3.9	66.9
	OTHER (see "Other Text", below)	43	32.3	33.1	100.0
	Total	130	97.7	100.0	
Missing	System	3	2.3		
Total		133	100.0		

Other Text

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Antitrust	12	9.0	27.9	27.9
	Civil Class Action	1	.8	2.3	30.2
	Class Action - Federal Statute	1	.8	2.3	32.6
	Consumer Fraud	4	3.0	9.3	41.9
	Declaratory judgment	1	.8	2.3	44.2
	ERISA fiduciary duty	1	.8	2.3	46.5
	Legal Malpractice	1	.8	2.3	48.8

	Maritime	1	.8	2.3	51.2
	Products Liability	1	.8	2.3	53.5
	RICO	8	6.0	18.6	72.1
	Securities	7	5.3	16.3	88.4
	TCPA	1	.8	2.3	90.7
	Trade secrets, non-compete	3	2.4	7.0	97.7
	Truth in Lending Act	1	.8	2.3	100.0
	Total	43	32.3	100.0	
Missing	System	90	67.7		
Total		133	100.0		

- Three respondents (2%) declined to answer this question

- Of those who provided an answer (130), no respondents (0%) indicated that their Pilot Program case involved:
  - Federal Tax;
  - Forfeiture/Penalty;
  - Prisoner Petition; and
  - Social Security.

- Of those who provided an answer, 87 respondents (67%) selected from the categories provided:
  - 28 respondents (22%) had a "employment/labor/employee benefits" case in the Pilot Program;
  - 20 respondents (15%) had a "property rights (copyright, patent, trademark)" case;
  - 18 respondents (14%) had a "contract" case;
  - 7 respondents (5%) had a "torts (personal injury)" case;
  - 5 respondents (4%) had a "civil rights" case;
  - 5 respondents (4%) had a "torts (personal property)" case;
  - 2 respondents (2%) had a "bankruptcy" case; and
  - 2 respondents (2%) had a "real property" case.

- 43 respondents (32%) selected "other" and entered the case type. The committee will need to decide whether to classify any of the "other" responses into one of the categories provided. If this is done, the percentages will need to be re-calculated (out of a total of 130). The following are "other" categories entered by more than one respondent:
  - 12 respondents (9%) had an "antitrust" case
  - 8 respondents (6%) had a "RICO" case
  - 7 respondents (5%) had a "securities" case
  - 4 respondents (3%) had a "consumer fraud" case
  - 3 respondents (2%) had a "trade secrets/non-compete" case

6. Party/parties you represent(ed):

- □ Single plaintiff
- □ Multiple plaintiffs
- □ Single defendant
- □ Multiple defendants

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Multiple defendants	26	19.5	19.7	19.7
	Multiple plaintiffs	27	20.3	20.5	40.2
	Single defendant	40	30.1	30.3	70.5
	Single plaintiff	39	29.3	29.5	100.0
	Total	132	99.2	100.0	
Missing	System	1	.8		
Total		133	100.0		

- One respondent (1%) declined to answer this question.

- Of those who provided an answer (132):
  - 39 respondents (30%) represented a single plaintiff in the Pilot Program case;
  - 27 respondents (21%) represented multiple plaintiffs;
  - 40 respondents (30%) represented a single defendant;
  - 26 respondents (20%) represented multiple defendants.

- Respondents are perfectly split between those who represented plaintiffs (66 respondents, 50%) and those who represented defendants (66 respondents, 50%) in the Pilot Program case.

- A majority represented a single party (79 respondents, 60%), while a minority represented multiple parties (53 respondents, 40%).

7. Type of party you represent(ed):
(If multiple parties, check all that apply.)

- □ Private individual
- □ Unit of government/government official
- □ Publicly-held company
- □ Privately-held company
- □ Nonprofit organization
- □ Other: _____ (please specify)

Private individual

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	79	59.4	59.4	59.4
	Yes	54	40.6	40.6	100.0
	Total	133	100.0	100.0	

Unit of government/government official

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	130	97.7	97.7	97.7
	Yes	3	2.3	2.3	100.0
	Total	133	100.0	100.0	

Publicly-held company

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	106	79.7	79.7	79.7
	Yes	27	20.3	20.3	100.0
	Total	133	100.0	100.0	

Privately-held company

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	65	48.9	48.9	48.9
	Yes	68	51.1	51.1	100.0
	Total	133	100.0	100.0	

Nonprofit organization

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	133	100.0	100.0	100.0

Other

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	132	99.2	99.2	99.2
	Yes	1	.8	.8	100.0
	Total	133	100.0	100.0	

Other Text

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Health & Welfare Fund	1	.8	100.0	100.0
Total		1	.8	100.0	
Missing	System	132	99.2		
Total		133	100.0		

- Of the categories provided:
  - 68 respondents (51%) indicated representing a "privately-held company" in the Pilot Program case;
  - 54 respondents (41%) indicated representing a "private individual";
  - 27 respondents (20%) indicated representing a "publicly-held company";
  - Three respondents (2%) indicated representing a "unit of government/government official";
  - No respondents (0%) indicated representing a "nonprofit organization".

- One respondent (1%) selected the "other" category and indicated representing a "health and welfare" fund.

8. Please indicate the stage of the case at the time it was selected for the Pilot Program, and as it stands today.

	a. When selected for the Pilot Program	b. Today
FRCP 26(f) Meet and Confer	□	□
Initial Status Conference (FRCP 16(b) Conference)	□	□
Discovery	□	□
Mediation	□	□
Trial	□	□
Settlement or Judgment	□	□

- This question was drafted with the intention that each respondent would choose one stage of the case for "when selected for the Pilot Program" and one stage for "today". Unfortunately, the computerized version of the question was not programmed to limit the answer in such a way. Therefore, many respondents selected multiple stages for each point in time. In addition, one respondent reported an inability to select the same stage for both periods, although the case was in the same stage at both times. Accordingly, the data for this question is not as clean and precise as originally hoped.

- 53 respondents (40%) completed the question correctly, by indicating one stage for each point in time.

- Of those who completed the question correctly, the following are the responses for the stage at the point *when the case was selected for the Pilot Program*:
  - 23 respondents (43%) indicated that the case was at the FRCP 16(b) initial status conference phase;
  - 16 respondents (30%) indicated that the case was in discovery;
  - 12 respondents (23%) indicated that the case was at the FRCP 26(f) meet and confer phase;
  - Two respondents (4%) indicated that the case was in mediation;
  - No respondents (0%) indicated that the case was in trial or had resolved by settlement or judgment.

- Of those who completed the question correctly, the following are the responses for the stage at the point *when the survey was completed*:
  - 29 respondents (55%) indicated that the case was in discovery;
  - Nine respondents (17%) indicated that the case had resolved by settlement or judgment;
  - Eight respondents (15%) indicated that the case was in mediation;
  - Five respondents (9%) indicated that the case was at the FRCP 16(b) initial status conference phase;
  - Two respondents (4%) indicated that the case was in trial;
  - No respondents (0%) indicated that the case was at the FRCP 26(f) meet and confer phase.

- When selected for the Pilot Program, two-thirds of respondents (66%) were at the 26(f) meet and confer or 16(b) initial status conference phase for their case; almost one-third (30%) were already in discovery.

- When the respondents completed the survey, a majority were in discovery for their case; about one-third (32%) had cases that were in mediation or resolved; and about one in ten were still in the 16(b) initial status conference phase.

- Considering all respondents (133) and not simply those who answered the question correctly (53), the response pattern was the generally same:
  - For the stage *when selected for the Pilot Program*, the most common answer was 16(b) initial status conference, followed by discovery, 26(f) meet and confer, and mediation.
  - For the stage *when the survey was completed*, the most common answer was discovery, followed by mediation, settlement or judgment, and initial status conference.

Please continue to refer to your Pilot Program case.

9. How much of the information exchanged between the parties, in response to requests for documents and information, was (or likely will be) in electronic format?

- □ Less than 25%
- □ Between 26% and 50%
- □ Between 51% and 75%
- □ More than 75%

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Less than 25%	48	36.1	36.4	36.4
	Between 26% and 50%	21	15.8	15.9	52.3
	Between 51% and 75%	20	15.0	15.2	67.4
	More than 75%	43	32.3	32.6	100.0
	Total	132	99.2	100.0	
Missing	System	1	.8		
Total		133	100.0		

- One respondent (1% of total respondents) declined to answer the question.

- Of those who provided an answer (132):
  - 48 respondents (36%) indicated electronic format for less than 25% of the information exchanged in the Pilot Program case;
  - 21 respondents (16%) indicated electronic format for 26-50% of the information exchanged;
  - 20 respondents (15%) indicated electronic format for 51-75% of the information exchanged;
  - 43 respondents (33%) indicated electronic format for more than 75% of the information exchanged.

- A narrow majority of respondents (69 respondents; 52%) had a Pilot Program case with 50% or less of the information exchanged in electronic format, while the remaining respondents (63 respondents; 48%) had a case with more than 50% of the information exchanged in electronic format.

10. Did (or do you anticipate that) any REQUESTING party (will) bear a material portion of the costs to produce requested ESI?

□ Yes
□ No

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	91	68.4	69.5	69.5
	Yes	40	30.1	30.5	100.0
	Total	131	98.5	100.0	
Missing	System	2	1.5		
Total		133	100.0		

- Two respondents (2% of total respondents) declined to answer the question.

- Of those who provided an answer (131):
  - 91 respondents (70%) indicated no payment by the requesting party of a material portion of the costs to produce ESI;
  - 40 respondents (31%) indicated payment by the requesting party of a material portion of the costs to produce ESI.

- Roughly speaking, approximately one-third of Pilot Program cases involve cost-shifting related to the production of ESI, while approximately two-thirds of Pilot Program cases do not involve such cost-shifting.

For simplicity, this survey refers to your "client" in the singular. However, this survey is case-specific, not party-specific. Thus, if you represented multiple parties, please consider the experiences of all your clients collectively, rather than the experience of only one client.

11. For the e-discovery in this case, please indicate the role your client did (or likely will) play:

- Primarily a requesting party
- Primarily a producing party
- Equally a requesting and a producing party
- Neither a requesting nor a producing party

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Equally a requesting and a producing party	33	24.8	25.0	25.0
	Neither a requesting nor a producing party	9	6.8	6.8	31.8
	Primarily a producing party	46	34.6	34.8	66.7
	Primarily a requesting party	44	33.1	33.3	100.0
	Total	132	99.2	100.0	
Missing	System	1	.8		
Total		133	100.0		

- One respondent (1% of total respondents) declined to answer the question.

- Of those who provided an answer (132):
  - 44 respondents (33%) indicated representing a party primarily requesting ESI in the Pilot Program case;
  - 46 respondents (35%) indicated representing a party primarily producing ESI;
  - 33 respondents (25%) indicated representing a party equally requesting and producing ESI;
  - 9 respondents (7%) indicated representing a party neither requesting nor producing ESI.

- Respondents are fairly evenly divided with respect to their client's role in e-discovery. Roughly speaking, one-third primarily request, one-third primarily produce, and one-third play a more neutral role.

12. Please indicate whether your client's ESI connected with this case could be described as: (Check all that apply.)

- □ High volume of data (more than 100 gigabytes or 40 custodians)
- □ Legacy data (contained in an archive or obsolete system)
- □ Disaster recovery data (contained in a backup system)
- □ Segregated data (subject to a special process, e.g., "confidential" information)
- □ Automatically updated data (e.g., metadata or online access data)
- □ Structured data (e.g., databases, applications)
- □ Foreign data (e.g., foreign character sets, data subject to international privacy laws)

High volume of data (more than 100 gigabytes or 40 custodians)

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	106	79.7	79.7	79.7
	Yes	27	20.3	20.3	100.0
	Total	133	100.0	100.0	

Legacy data (contained in an archive or obsolete system)

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	96	72.2	72.2	72.2
	Yes	37	27.8	27.8	100.0
	Total	133	100.0	100.0	

Disaster recovery data (contained in a backup system)

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	123	92.5	92.5	92.5
	Yes	10	7.5	7.5	100.0
	Total	133	100.0	100.0	

Segregated data (subject to a special process, e.g., "confidential" information)

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	100	75.2	75.2	75.2
	Yes	33	24.8	24.8	100.0
	Total	133	100.0	100.0	

Automatically updated data (e.g., metadata or online access data)

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	113	85.0	85.0	85.0
	Yes	20	15.0	15.0	100.0
	Total	133	100.0	100.0	

Structured data (e.g., databases, applications)

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	84	63.2	63.2	63.2
	Yes	49	36.8	36.8	100.0
	Total	133	100.0	100.0	

Foreign data
(e.g., foreign character sets, data subject to international privacy laws)

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	129	97.0	97.0	97.0
	Yes	4	3.0	3.0	100.0
	Total	133	100.0	100.0	

- With respect to the level of challenge presented by the client's ESI in connection with the Pilot Program case:
  - 49 respondents (44%) indicated "structured data," such as databases and applications;
  - 37 respondents (28%) indicated "legacy data" contained in an archive or obsolete system;
  - 33 respondents (25%) indicated "segregated data" subject to a special process;
  - 27 respondents (20%) indicated a "high volume of data" involving more than 100 gigabytes or 40 custodians;
  - 20 respondents (15%) indicated "automatically updated data," such as metadata or online access data;
  - 10 respondents (8%) indicated "disaster recovery data" contained in a backup system;
  - 4 respondents (3%) indicated "foreign data."

- 107 respondents (81%) indicated that their client's ESI involved one or more of the enumerated types of data; 26 respondents (19%) did not select any of the enumerated types of data. Accordingly, four out of five respondents faced a particular challenge with respect to their client's ESI in connection with the Pilot Program case.

Please continue to refer to your Pilot Program case.

13. Please indicate whether the following events occurred. In the context of this question, "you" means either you personally or another member of your legal team. If the event does not apply due to the particulars or the timing of the case, check "N/A".

	Yes	No	N/A
a. At the outset of the case, you discussed the preservation of ESI with opposing counsel.	☐	☐	☐
b. Prior to meeting with opposing counsel, you became familiar with your client's electronic data and data system(s).	☐	☐	☐
c. At or soon after the FRCP 26(f) conference, the parties discussed potential methods for identifying ESI for production.	☐	☐	☐
d. Prior to the initial status conference (FRCP 16 conference), you met with opposing counsel to discuss the discovery process and ESI.	☐	☐	☐
e. At the initial status conference (FRCP 16 conference), unresolved e-discovery disputes were presented to the court.	☐	☐	☐
f. E-discovery disputes arising after the initial status conference (FRCP 16 conference) were raised promptly with the court.	☐	☐	☐

a. At the outset of the case, you discussed the preservation of ESI with opposing counsel.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	47	35.3	36.2	36.2
	Not Applicable	17	12.8	13.1	49.2
	Yes	66	49.6	50.8	100.0
	Total	130	97.7	100.0	
Missing	System	3	2.3		
Total		133	100.0		

- Three respondents (2% of total respondents) declined to answer the question.

- Of those who provided an answer (130):
  - 66 respondents (51%) indicated that ESI preservation was discussed with opposing counsel at the outset of the Pilot Project case;
  - 47 respondents (36%) indicated that ESI was not discussed at the outset of the case;
  - 17 respondents (13%) indicated that the question did not apply due to the timing or particulars of the case.

- Of those to whom the question applied (113), a majority (58%) reported early discussion of the preservation of electronically stored information; however, a substantial portion (42%) reported that this did not occur.

b. Prior to meeting with opposing counsel, you became familiar with your client's electronic data and data system(s).

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	28	21.1	22.0	22.0
	Not Applicable	20	15.0	15.7	37.8
	Yes	79	59.4	62.2	100.0
	Total	127	95.5	100.0	
Missing	System	6	4.5		
Total		133	100.0		

- Six respondents (5% of total respondents) declined to answer the question.

- Of those who provided an answer (127):
  - 79 respondents (62%) indicated becoming familiar with the client's electronic data and data systems prior to meeting with opposing counsel;
  - 28 respondents (22%) indicated not becoming familiar with the client's data and data systems;
  - 20 respondents (16%) indicated that the question did not apply due to the timing or particulars of the case.

- Of those to whom the question applied (107), nearly three-quarters (74%) reported becoming familiar with their client's electronic data and data systems prior to meeting with opposing counsel; however, over one-quarter (26%) reported not achieving such familiarity.

c. At or soon after the FRCP 26(f) conference, the parties discussed potential methods for identifying ESI for production.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	34	25.6	26.0	26.0
	Not Applicable	24	18.0	18.3	44.3
	Yes	73	54.9	55.7	100.0
	Total	131	98.5	100.0	
Missing	System	2	1.5		
Total		133	100.0		

- Two respondents (2% of total respondents) declined to answer the question.

- Of those who provided an answer (131):
  - 73 respondents (56%) indicated that the parties discussed potential methods for identifying ESI at or soon after the FRCP 26(f) conference;
  - 34 respondents (26%) indicated that the parties did not discuss methods for identifying ESI at that time;
  - 24 respondents (18%) indicated that the question did not apply due to the timing or particulars of the case.

- Of those to whom the question applied (107), over two-thirds (68%) reported a discussion of ESI identification methods around the time of the 26(f) conference; however, nearly one-third (32%) reported no such discussion.

d. Prior to the initial status conference (FRCP 16 conference), you met with opposing counsel to discuss the discovery process and ESI.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	46	34.6	35.7	35.7
	Not Applicable	25	18.8	19.4	55.0
	Yes	58	43.6	45.0	100.0
	Total	129	97.0	100.0	
Missing	System	4	3.0		
Total		133	100.0		

- Four respondents (3% of total respondents) declined to answer the question.

- Of those who provided an answer (129):
  - 58 respondents (45%) indicated meeting with opposing counsel to discuss the discovery process and ESI prior to the initial status conference;
  - 46 respondents (36%) indicated that such a meeting did not occur;
  - 25 respondents (19%) indicated that the question did not apply due to the timing or particulars of the case.

- Of those to whom the question applied (104), a majority (56%) reported meeting with opposing counsel to discuss the discovery process and prior to the initial status conference; however, a substantial portion (44%) reported no such meeting.

e. At the initial status conference (FRCP 16 conference), unresolved e-discovery disputes were presented to the court.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	56	42.1	43.1	43.1
	Not Applicable	55	41.4	42.3	85.4
	Yes	19	14.3	14.6	100.0
	Total	130	97.7	100.0	
Missing	System	3	2.3		
Total		133	100.0		

- Three respondents (2% of total respondents) declined to answer the question.

- Of those who provided an answer (130):
  - 19 respondents (15%) indicated that unresolved e-discovery disputes were presented to the court at the initial status conference;

- 56 respondents (43%) indicated that unresolved e-discovery disputes were not presented to the court at the initial status conference;
- 55 respondents (42%) indicated that the question did not apply due to the timing or particulars of the case.

- Of those to whom the question applied (75), exactly three-quarters (75%) reported that unresolved e-discovery disputes were not brought to the court's attention at the initial status conference; only one-quarter (25%) reported that such disputes were raised with the court at that time.

f. E-discovery disputes arising after the initial status conference (FRCP 16 conference) were raised promptly with the court.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	22	16.5	16.9	16.9
	Not Applicable	80	60.2	61.5	78.5
	Yes	28	21.1	21.5	100.0
	Total	130	97.7	100.0	
Missing	System	3	2.3		
Total		133	100.0		

- Three respondents (2% of total respondents) declined to answer the question.

- Of those who provided an answer (130):
  - 28 respondents (22%) indicated that e-discovery disputes arising after the initial status conference were raised promptly with the court;
  - 22 respondents (17%) indicated that e-discovery disputes arising after the initial status conference were not raised promptly with the court;
  - 80 respondents (62%) indicated that the question did not apply due to the timing or particulars of the case.

- Of those to whom the question applied (50), a majority (56%) reported that e-discovery disputes after the initial status conference were promptly brought to the court's attention; however, a substantial portion (44%) reported that such disputes were not promptly raised.

14. Please indicate the e-discovery topics discussed with opposing counsel prior to commencing discovery. If discovery has not commenced, please indicate the topics that have been discussed to this point. (Check all that apply.)

□ Scope of ESI to be preserved by the parties
□ Procedure for preservation of ESI
□ Scope of relevant and discoverable ESI
□ Search methodologies to identify ESI for production
□ Format(s) of production for ESI
□ Conducting e-discovery in phases or stages
□ Data requiring extraordinary affirmative measures to collect (such as: hard drive data that is "deleted", "slack", "fragmented", or "unallocated"; online access data; frequently and automatically updated metadata, backup tapes, etc.)
□ Procedures for handling production of privileged information or work product in electronic form
□ Timeframe for completing e-discovery
□ Any need for special procedures to manage ESI
□ Other: _____

Scope of ESI to be preserved by parties

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	69	51.9	51.9	51.9
	Yes	64	48.1	48.1	100.0
	Total	133	100.0	100.0	

Procedure for preservation of ESI

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	91	68.4	68.4	68.4
	Yes	42	31.6	31.6	100.0
	Total	133	100.0	100.0	

Scope of relevant and discoverable ESI

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	65	48.9	48.9	48.9
	Yes	68	51.1	51.1	100.0
	Total	133	100.0	100.0	

Search methodologies to identify ESI for production

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	88	66.2	66.2	66.2
	Yes	45	33.8	33.8	100.0
	Total	133	100.0	100.0	

Format(s) of production for ESI

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	68	51.1	51.1	51.1
	Yes	65	48.9	48.9	100.0
	Total	133	100.0	100.0	

Conducting e-discovery in phases or stages

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	100	75.2	75.2	75.2
	Yes	33	24.8	24.8	100.0
	Total	133	100.0	100.0	

Data requiring extraordinary affirmative measures to collect (such as: hard drive data that is "deleted", "slack", "fragmented", or "unallocated"; online access data; frequently and automatically updated metadata, backup tapes, etc.)

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	115	86.5	86.5	86.5
	Yes	18	13.5	13.5	100.0
	Total	133	100.0	100.0	

Procedures for handling production of privileged information or work product in electronic form

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	94	70.7	70.7	70.7
	Yes	39	29.3	29.3	100.0
	Total	133	100.0	100.0	

Timeframe for completing e-discovery

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	88	66.2	66.2	66.2
	Yes	45	33.8	33.8	100.0
	Total	133	100.0	100.0	

Any need for special procedures to manage ESI

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	116	87.2	87.2	87.2
	Yes	17	12.8	12.8	100.0
	Total	133	100.0	100.0	

Other (See "Other Text", below)

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	124	93.2	93.2	93.2
	Yes	9	6.8	6.8	100.0
	Total	133	100.0	100.0	

Other Text

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Case settled before substantive discovery	1	.8	10.0	10.0
	Discovery commenced long before case was designated for participation in pilot program.	1	.8	10.0	20.0
	Discovery had commenced when we were selected for the program	1	.8	10.0	30.0
	ESI was not discussed	1	.8	10.0	40.0
	Just email	1	.8	10.0	50.0
	None	2	1.5	20.0	70.0
	Not applicable, this was enforcement of a third party subpoena	1	.8	10.0	80.0

	Plaintiff's discovery to be submitted within 1 week	1	.8	10.0	90.0
	Still too early	1	.8	10.0	100.0
	Total	10	7.5	100.0	
	Missing	123	92.5		
	Total	133	100.0		

- Every e-discovery topic listed in the question was selected by over 10% of respondents as having been a point of discussion with opposing counsel prior to commencing discovery.

- Of the topics listed:
  - 68 respondents (51%) discussed the scope of relevant and discoverable ESI;
  - 65 respondents (49%) discussed the format(s) of production for ESI;
  - 64 respondents (48%) discussed the scope of ESI to be preserved by the parties;
  - 45 respondents (34%) discussed search methodologies to identify ESI for production;
  - 45 respondents (34%) discussed the timeframe for completing e-discovery;
  - 42 respondents (32%) discussed the procedure for preservation of ESI;
  - 39 respondents (29%) discussed procedures for handling production of privileged information or work product in electronic form;
  - 33 respondents (25%) discussed conducting e-discovery in phases or stages;
  - 18 respondents (14%) discussed data requiring extraordinary affirmative measures to collect;
  - 17 respondents (13%) discussed the need for special procedures to manage ESI.

- 9 respondents (7%) selected the "other" response option. In addition, 10 respondents (8%) wrote in the text box for "other". However, only one of those respondents (1% of all respondents) indicated an addition topic of discussion: "Just email." The other comments relate to the applicability of the question or indicate that e-discovery was not discussed.

- Only one topic – the scope of relevant and discoverable ESI – was discussed by a majority of respondents. However, preservation scope and production format were discussed by almost of half respondents. Moreover, approximately one in three respondents discussed search methodologies, the e-discovery timeframe, ESI preservation procedures, and handling protected information. One-quarter discussed staggered discovery, while fewer than 15% discussed extraordinary data or the need for special procedures.

Please continue to refer to your Pilot Program case.

FRCP 26(b)(2)(C) calls for consideration of the following factors in determining whether the burden or expense of proposed discovery outweighs its likely benefit: 1) the needs of the case; 2) the amount in controversy; 3) the parties' resources; 4) the importance of the issues at stake in the action; and 5) the importance of the discovery in resolving the issues.

15. Did the proportionality factors set forth in FRCP 26(b)(2)(C) play a significant role in the development of the discovery plan?

- Yes
- No
- No discovery plan for this case

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	75	56.4	57.3	57.3
	No discovery plan for this case	29	21.8	22.1	79.4
	Yes	27	20.3	20.6	100.0
	Total	131	98.5	100.0	
Missing	System	2	1.5		
Total		133	100.0		

- Two respondents (2% of total respondents) declined to answer the question.

- Of those who did provide an answer (131):
  - 75 respondents (57%) indicated that the FRCP 26(b)(2)(C) proportionality factors *did not* play a significant role in the development of the discovery plan for the Pilot Program case;
  - 29 respondents (22%) indicated that the Pilot Program case did not have a discovery plan;
  - 27 respondents (21%) indicated that the FRCP proportionality factors *did* play a significant role in developing the discovery plan.

- Of those with a discovery plan for the Pilot Program case (102), only about one-quarter of respondents (26%) reported that proportionality factors played a significant role in developing the plan; nearly three out of four respondents reported no significant role for proportionality factors (74%).

16. Please assess the level of cooperation among opposing counsel in:

	Poor	Adequate	Excellent	N/A
a. Facilitating understanding of the ESI related to the case	□	□	□	□
b. Facilitating understanding of the data systems involved	□	□	□	□
c. Formulating a discovery plan	□	□	□	□
d. Reasonably limiting discovery requests and responses	□	□	□	□
e. Ensuring proportional e-discovery consistent with the factors listed in FRCP 26(b)(2)(C)	□	□	□	□

a. Facilitating understanding of the ESI related to the case

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Poor	15	11.3	11.5	11.5
	Adequate	62	46.6	47.7	59.2
	Excellent	21	15.8	16.2	75.4
	Not Applicable	32	24.1	24.6	100.0
	Total	130	97.7	100.0	
Missing	System	3	2.3		
Total		133	100.0		

- Three respondents (2% of total respondents) declined to answer the question.

- Of those who provided a response (130) on the level of cooperation among opposing counsel to facilitate understanding of the ESI related to the Pilot Program case:
  - 21 respondents (16%) selected “excellent”;
  - 62 respondents (48%) selected “adequate”;
  - 15 respondents (12%) selected “poor”;
  - 32 respondents (25%) selected “not applicable”.

- Of those to whom the question applied (98):
  - 21% selected “excellent”;
  - 63% selected “adequate”;
  - 15% selected “poor”.

- Thus, where applicable, 85% of respondents indicated that cooperation among opposing counsel in the Pilot Program case to facilitate understanding case-related ESI was at least adequate, while only 15% indicated that cooperation was poor.

b. Facilitating understanding of the data systems involved

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Poor	16	12.0	12.4	12.4
	Adequate	51	38.3	39.5	51.9
	Excellent	14	10.5	10.9	62.8
	Not Applicable	48	36.1	37.2	100.0
	Total	129	97.0	100.0	
Missing	System	4	3.0		
Total		133	100.0		

- Four respondents (3% of total respondents) declined to answer the question.

- Of those who provided a response (129) on the level of cooperation among opposing counsel to facilitate understanding of the data systems involved:
  - 14 respondents (11%) selected "excellent";
  - 51 respondents (40%) selected "adequate";
  - 16 respondents (12%) selected "poor";
  - 48 respondents (37%) selected "not applicable".

- Of those to whom the question applied (81):
  - 17% selected "excellent";
  - 63% selected "adequate";
  - 20% selected "poor".

- Thus, where applicable, 80% of respondents indicated that cooperation among opposing counsel in the Pilot Program case to facilitate understanding of the data systems was at least adequate, while only one in five indicated that cooperation was poor.

c. Formulating a discovery plan

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Poor	14	10.5	10.9	10.9
	Adequate	65	48.9	50.4	61.2
	Excellent	27	20.3	20.9	82.2
	Not Applicable	23	17.3	17.8	100.0
	Total	129	97.0	100.0	
Missing	System	4	3.0		
Total		133	100.0		

- Four respondents (3%) of total respondents declined to answer the question.

- Of those who provided a response (129) on the level of cooperation among opposing counsel in formulating a discovery plan:
  - 27 respondents (21%) selected “excellent”;
  - 65 respondents (50%) selected “adequate”;
  - 14 respondents (11%) selected “poor”;
  - 23 respondents (18%) selected “not applicable”.

- Of those to whom the question applied (106):
  - 26% selected “excellent”;
  - 61% selected “adequate”;
  - 13% selected “poor”.

- Thus, where applicable, 87% of respondents indicated that cooperation among opposing counsel in the Pilot Program case to formulate a discovery plan was at least adequate, while fewer than 15% indicated that cooperation was poor.

d. Reasonably limiting discovery requests and responses

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Poor	28	21.1	21.4	21.4
	Adequate	55	41.4	42.0	63.4
	Excellent	17	12.8	13.0	76.3
	Not Applicable	31	23.3	23.7	100.0
	Total	131	98.5	100.0	
Missing	System	2	1.5		
Total		133	100.0		

- Two respondents (2% of total respondents) declined to answer the question.

- Of those who provided a response (131) on the level of cooperation among opposing counsel in reasonably limiting discovery requests and responses:
  - 17 respondents (13%) selected “excellent”;
  - 55 respondents (42%) selected “adequate”;
  - 28 respondents (21%) selected “poor”;
  - 31 respondents (24%) selected “not applicable”.

- Of those to whom the question applied (100):
  - 17% selected “excellent”;
  - 55% selected “adequate”;
  - 28% selected “poor”.

- Thus, where applicable, 72% of respondents indicated that cooperation among opposing counsel in the Pilot Program case to reasonably limit discovery requests and responses was at least adequate, while fewer than one in three indicated that cooperation was poor.

e. Ensuring proportional e-discovery consistent with the factors listed in FRCP 26(b)(2)(C)

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Poor	21	15.8	16.3	16.3
	Adequate	49	36.8	38.0	54.3
	Excellent	10	7.5	7.8	62.0
	Not Applicable	49	36.8	38.0	100.0
	Total	129	97.0	100.0	
Missing	System	4	3.0		
Total		133	100.0		

- Four respondents (3%) of total respondents declined to answer the question.

- Of those who provided a response (129) on the level of cooperation among opposing counsel in ensuring proportional e-discovery:
  - 10 respondents (8%) selected "excellent";
  - 49 respondents (38%) selected "adequate";
  - 21 respondents (16%) selected "poor";
  - 49 respondents (38%) selected "not applicable".

- Of those to whom the question applied (80):
  - 13% selected "excellent";
  - 61% selected "adequate";
  - 26% selected "poor".

- Thus, where applicable, 74% of respondents indicated that cooperation among opposing counsel in the Pilot Program case to ensure proportional e-discovery was at least adequate, while just over one in four indicated that cooperation was poor.

Please continue to refer to your Pilot Program case.

17. Please assess how application of the Pilot Program Principles has affected (or likely will affect) the following:

	Greatly Increased	Increased	No Effect	Decreased	Greatly Decreased
a. The level of cooperation exhibited by counsel to efficiently resolve the case	☐	☐	☐	☐	☐
b. Your ability to zealously represent your client	☐	☐	☐	☐	☐
c. The parties' ability to resolve e-discovery disputes early	☐	☐	☐	☐	☐
d. The parties' ability to resolve e-discovery disputes without court involvement	☐	☐	☐	☐	☐
e. The fairness of the e-discovery process	☐	☐	☐	☐	☐
f. Your ability to obtain relevant documents	☐	☐	☐	☐	☐
g. Allegations of spoliation or other sanctionable misconduct regarding the preservation or collection of ESI	☐	☐	☐	☐	☐
h. Discovery with respect to another party's efforts to preserve or collect ESI	☐	☐	☐	☐	☐

a. The level of cooperation exhibited by counsel to efficiently resolve the case

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Greatly Increased	2	1.5	1.6	1.6
	Increased	42	31.6	32.8	34.4
	No Effect	83	62.4	64.8	99.2
	Greatly Decreased	1	.8	.8	100.0
	Total	128	96.2	100.0	
Missing	System	5	3.8		
Total		133	100.0		

- Five respondents (4% of total respondents) declined to answer the question.

- Of those who provided an answer (128):
  - Two respondents (2%) indicated that application of the Principles "greatly increased" the level of cooperation exhibited by counsel to efficiently resolve the Pilot Program case;

- 42 respondents (33%) indicated that the Principles "increased" the level of cooperation;
- 83 respondents (65%) indicated that the Principles had "no effect" on the level of cooperation;
- No respondents (0%) indicated that application of the Principles "decreased" the level of cooperation;
- One respondent (1%) indicated that application of the Principles "greatly decreased" the level of cooperation.

- A majority of respondents reported a neutral effect on cooperation. Over one-third (34%) reported a positive effect, while only 1% reported a negative effect.

b. Your ability to zealously represent your client

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Greatly Increased	4	3.0	3.1	3.1
	Increased	24	18.0	19.0	22.0
	No Effect	94	70.7	74.0	96.1
	Decreased	4	3.0	3.2	99.2
	Greatly Decreased	1	.8	.8	100.0
	Total	127	95.5	100.0	
Missing	System	6	4.5		
Total		133	100.0		

- Six respondents (5% of total respondents) declined to answer the question.

- Of those who provided an answer (127):
  - Four respondents (3%) indicated that application of the Principles "greatly increased" the respondent's ability to zealously represent their client in the Pilot Program case;
  - 24 respondents (19%) indicated that the Principles "increased" zealous representation;
  - 94 respondents (74%) indicated that the Principles had "no effect" on zealous representation;
  - Four respondents (3%) indicated that the Principles "decreased" zealous representation;
  - One respondent (1%) indicated that application of the Principles "greatly decreased" zealous representation.

- A very strong majority of respondents (96%) reported either a neutral or a positive effect on the ability to zealously represent the client. Only 4% reported a negative effect.

c. The parties' ability to resolve e-discovery disputes early

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid					
	Total				
Missing	System				
Total		133	100.0		

- This question was mistakenly left out of the survey when it was put into computerized form. Therefore, we have no corresponding data.

d. The parties' ability to resolve e-discovery disputes without court involvement

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Greatly Increased	2	1.5	1.6	1.6
	Increased	47	35.3	37.0	38.6
	No Effect	77	57.9	60.6	99.2
	Decreased	1	.8	.8	100.0
	Total	127	95.5	100.0	
Missing	System	6	4.5		
Total		133	100.0		

- Six respondents (5% of total respondents) declined to answer the question.

- Of those who provided an answer (127):
  - Two respondents (2%) indicated that application of the Principles "greatly increased" the parties' ability to resolve e-discovery disputes without court involvement;
  - 47 respondents (37%) indicated that the Principles "increased" the ability to resolve e-discovery disputes;
  - 77 respondents (61%) indicated that the Principles had "no effect" on the ability to resolve e-discovery disputes;
  - One respondents (1%) indicated that the Principles "decreased" the ability to resolve e-discovery disputes;
  - No respondents (0%) indicated that application of the Principles "greatly decreased" the ability to resolve e-discovery disputes.

- A majority of respondents reported a neutral effect on the parties' ability to resolve e-discovery disputes without court involvement. Almost 40% (39%) reported a positive effect, while only 1% reported a negative effect.

e. The fairness of the e-discovery process

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Greatly Increased	7	5.3	5.6	5.6
	Increased	47	35.3	37.3	42.9
	No Effect	69	51.9	54.8	97.6
	Decreased	2	1.5	1.6	99.2
	Greatly Decreased	1	.8	.8	100.0
	Total	126	94.7	100.0	
Missing	System	7	5.3		
Total		133	100.0		

- Seven respondents (5% of total respondents) declined to answer the question.

- Of those who provided an answer (126):
  - Seven respondents (6%) indicated that application of the Principles "greatly increased" the fairness of the e-discovery process.
  - 47 respondents (37%) indicated that the Principles "increased" the fairness of the e-discovery process;
  - 69 respondents (55%) indicated that the Principles had "no effect" on procedural fairness;
  - Two respondents (2%) indicated that the Principles "decreased" fairness;
  - One respondent (1%) indicated that the Principles "greatly decreased" fairness.

- A majority of respondents reported a neutral effect on the fairness of the e-discovery process, and a substantial portion (43%) reported a positive effect. Only 2% reported a negative effect.

f. Your ability to obtain relevant documents

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Greatly Increased	4	3.0	3.2	3.2
	Increased	34	25.6	27.2	30.4
	No Effect	82	61.7	65.6	96.0
	Decreased	4	3.0	3.2	99.2
	Greatly Decreased	1	.8	.8	100.0
	Total	125	94.0	100.0	
Missing	System	8	6.0		
Total		133	100.0		

- Eight respondents (6% of total respondents) declined to answer the question.

- Of those who provided an answer (125):
  - Four respondents (3%) indicated that application of the Principles "greatly increased" the respondent's ability to obtain relevant documents;
  - 34 respondents (27%) indicated that the Principles "increased" the ability to obtain relevant documents;
  - 82 respondents (66%) indicated that the Principles had "no effect" on the ability to obtain relevant documents;
  - Four respondents (3%) indicated that the Principles "decreased" the ability to obtain relevant documents;
  - One respondent (1%) indicated that the Principles "greatly decreased" the ability to obtain relevant documents.

- Two-thirds of respondents reported a neutral effect on the respondent's ability to obtain relevant documents. Almost one-third (30%) reported a positive effect, while only 4% reported a negative effect.

g. Allegations of spoliation or other sanctionable misconduct regarding the preservation or collection of ESI

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Increased	23	17.3	18.0	18.0
	No Effect	94	70.7	73.4	91.4
	Decreased	9	6.8	7.0	98.4
	Greatly Decreased	2	1.5	1.6	100.0
	Total	128	96.2	100.0	
Missing	System	5	3.8		
Total		133	100.0		

- Five respondents (4% of total respondents) declined to answer the question.

- Of those who provided an answer (128):
  - No respondents (0%) indicated that application of the Principles "greatly increased" allegations of spoliation or other sanctionable misconduct regarding ESI preversation or collection;
  - 23 respondents (18%) indicated that the Principles "increased" allegations of misconduct;
  - 94 respondents (73%) indicated that the Principles had "no effect" on the number of allegations;
  - Nine respondents (7%) indicated that the Principles "decreased" such allegations;
  - Two respondents (2%) indicated that the Principles "greatly decreased" such allegations.

- Nearly three-quarters of respondents reported a neutral effect on the number of allegations of misconduct regarding ESI preservation or collection. However, only 9% reported a beneficial (decrease) effect, while 15% reported a detrimental (increase) effect.

h. Discovery with respect to another party's efforts to preserve or collect ESI

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Greatly Increased	1	.8	.8	.8
	Increased	33	24.8	26.0	26.8
	No Effect	90	67.7	70.9	97.6
	Decreased	2	1.5	1.6	99.2
	Greatly Decreased	1	.8	.8	100.0
	Total	127	95.5	100.0	
Missing	System	6	4.5		
Total		133	100.0		

- Six respondents (5% of total respondents) declined to answer the question.

- Of those who provided an answer (127):
  - One respondent (1%) indicated that application of the Principles "greatly increased" discovery with respect to another party's efforts to preserve or collect ESI;
  - 33 respondents (26%) indicated that the Principles "increased" such discovery;
  - 90 respondents (71%) indicated that the Principles had "no effect" on the amount of such discovery;
  - Two respondents (2%) indicated that the Principles "decreased" such discovery;
  - One respondent (1%) indicated that the Principles "greatly decreased" such discovery.

- A majority of respondents reported a neutral effect on the level of discovery with respect to ESI preservation and collection efforts. However, only 2% reported a beneficial (decrease) effect, while 27% reported a detrimental (increase) effect.

18. Please assess how application of the Pilot Program Principles has affected (or likely will affect) the following, for your client:

	Greatly Increased	Increased	No Effect	Decreased	Greatly Decreased
a. Discovery costs	☐	☐	☐	☐	☐
b. Total litigation costs	☐	☐	☐	☐	☐
c. Length of the discovery period	☐	☐	☐	☐	☐
d. Length of the litigation	☐	☐	☐	☐	☐
e. Number of discovery disputes	☐	☐	☐	☐	☐

a. Discovery costs

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Greatly Increased	3	2.3	2.4	2.4
	Increased	23	17.3	18.3	20.6
	No Effect	72	54.1	57.1	77.8
	Decreased	28	21.1	22.2	100.0
	Total	126	94.7	100.0	
Missing	System	7	5.3		
Total		133	100.0		

- Seven respondents (5% of total respondents) declined to answer the question.

- Of those who provided an answer (126):
  - Three respondents (2%) indicated that application of the Principles "greatly increased" discovery costs;
  - 23 respondents (18%) indicated that the Principles "increased" discovery costs;
  - 72 respondents (57%) indicated that the Principles had "no effect" on discovery costs;
  - 28 respondents (22%) indicated that the Principles "decreased" discovery costs;
  - No respondents (0%) indicated that the Principles "greatly decreased" discovery costs.

- A majority of respondents reported a neutral effect on discovery costs. The remaining respondents were fairly evenly split between reporting a beneficial (decrease) effect (22%) and a detrimental (increase) effect (21%). Almost 80% indicated either a neutral or a beneficial effect.

b. Total litigation costs

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Greatly Increased	2	1.5	1.6	1.6
	Increased	25	18.8	19.7	21.3
	No Effect	74	55.6	58.3	79.5
	Decreased	26	19.5	20.5	100.0
	Total	127	95.5	100.0	
Missing	System	6	4.5		
Total		133	100.0		

- Six respondents (5% of total respondents) declined to answer the question.

- Of those who provided an answer (127):
  - Two respondents (2%) indicated that application of the Principles "greatly increased" total litigation costs;
  - 25 respondents (20%) indicated that the Principles "increased" litigation costs;
  - 74 respondents (58%) indicated that the Principles had "no effect" on litigation costs;
  - 26 respondents (21%) indicated that the Principles "decreased" litigation costs;
  - No respondents (0%) indicated that the Principles "greatly decreased" litigation costs.

- A majority of respondents reported a neutral effect on litigation costs. The remaining respondents were fairly evenly split between reporting a beneficial (decrease) effect (22%) and a detrimental (increase) effect (21%). Almost 80% indicated either a neutral or a beneficial effect.

c. Length of the discovery period

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Greatly Increased	2	1.5	1.6	1.6
	Increased	15	11.3	11.8	13.9
	No Effect	97	72.9	76.4	89.8
	Decreased	12	9.0	9.4	99.2
	Greatly Decreased	1	.8	.8	100.0
	Total	127	95.5	100.0	
Missing	System	6	4.5		
Total		133	100.0		

- Six respondents (5% of total respondents) declined to answer the question.

- Of those who provided an answer (127):
  - Two respondents (2%) indicated that application of the Principles "greatly increased" the length of the discovery period;
  - 15 respondents (12%) indicated that the Principles "increased" the discovery period;

- 97 respondents (76%) indicated that the Principles had "no effect" on the discovery period;
- 12 respondents (9%) indicated that the Principles "decreased" the discovery period;
- One respondent (1%) indicated that the Principles "greatly decreased" the discovery period.

- Over three-quarters of respondents reported a neutral effect on the length of the discovery period. The remaining respondents were split between reporting a beneficial (decrease) effect (10%) and a detrimental (increase) effect (13%). Over 85% indicated either a neutral or a beneficial effect.

d. Length of the litigation

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Greatly Increased	2	1.5	1.6	1.6
	Increased	15	11.3	11.8	13.9
	No Effect	97	72.9	76.4	89.8
	Decreased	13	9.8	10.2	100.0
	Total	127	95.5	100.0	
Missing	System	6	4.5		
Total		133	100.0		

- Six respondents (5% of total respondents) declined to answer the question.

- Of those who provided an answer (127):
  - Two respondents (2%) indicated that application of the Principles "greatly increased" the length of the litigation;
  - 15 respondents (12%) indicated that the Principles "increased" litigation time;
  - 97 respondents (76%) indicated that the Principles had "no effect" on litigation time;
  - 13 respondents (10%) indicated that the Principles "decreased" litigation time;
  - No respondents (0%) indicated that the Principles "greatly decreased" litigation time.

- As with the length of the discovery period, over three-quarters of respondents reported a neutral effect on the length of the litigation. The remaining respondents were split between reporting a beneficial (decrease) effect (10%) and a detrimental (increase) effect (13%). Over 85% indicated either a neutral or a beneficial effect.

e. Number of discovery disputes

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Greatly Increased	2	1.5	1.6	1.6
	Increased	17	12.8	13.3	14.8
	No Effect	84	63.2	65.6	80.5
	Decreased	23	17.3	18.0	98.4
	Greatly Decreased	2	1.5	1.6	100.0
	Total	128	96.2	100.0	
Missing	System	5	3.8		
Total		133	100.0		

- Five respondents (4% of total respondents) declined to answer the question.

- Of those who provided an answer (128):
  - Two respondents (2%) indicated that application of the Principles "greatly increased" the number of discovery disputes;
  - 17 respondents (13%) indicated that the Principles "increased" discovery disputes;
  - 84 respondents (66%) indicated that the Principles had "no effect" on discovery disputes;
  - 23 respondents (18%) indicated that the Principles "decreased" discovery disputes;
  - Two respondents (2%) indicated that the Principles "greatly decreased" discovery disputes.

- Two-thirds of respondents reported a neutral effect on the number of discovery disputes. More respondents reported a beneficial (decrease) effect (20%) than a detrimental (increase) effect (15%). Exactly 85% indicated either a neutral or a beneficial effect.

19. Type of individual serving as your client's e-discovery liaison: (If you represent(ed) multiple parties, check all that apply.)

- □ In-house counsel
- □ Outside counsel
- □ Third party consultant
- □ Employee of the party
- □ No e-discovery liaison designated

In-house counsel

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	106	79.7	79.7	79.7
	Yes	27	20.3	20.3	100.0
	Total	133	100.0	100.0	

Outside counsel

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	113	85.0	85.0	85.0
	Yes	20	15.0	15.0	100.0
	Total	133	100.0	100.0	

Third party consultant

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	120	90.2	90.2	90.2
	Yes	13	9.8	9.8	100.0
	Total	133	100.0	100.0	

Employee of the party

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	96	72.2	72.2	72.2
	Yes	37	27.8	27.8	100.0
	Total	133	100.0	100.0	

No e-discovery liaison designated

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	91	68.4	68.4	68.4
	Yes	42	31.6	31.6	100.0
	Total	133	100.0	100.0	

- Every type of liaison listed in the question was selected by at least 10% of respondents.

- Of the types listed:
  - 37 respondents (28%) indicated that the individual serving as the liaison was an employee of the party;
  - 27 respondents (20%) indicated that the individual serving as the liaison was in-house counsel;
  - 20 respondents (15%) indicated that the liaison was outside counsel;
  - 13 respondents (10%) indicated that the liaison was a third party consultant.

- 42 respondents (32%) indicated that no e-discovery liaison was designated by their client.

20. Please indicate your level of agreement with the following statements.

	Strongly Agree	Agree	Disagree	Strongly Disagree	N/A
a. The involvement of my client's e-discovery liaison has contributed to a more efficient discovery process.	□	□	□	□	□
b. The involvement of the e-discovery liaison for the other party/parties has contributed to a more efficient discovery process.	□	□	□	□	□

a. The involvement of my client's e-discovery liaison has contributed to a more efficient discovery process.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Strongly Agree	11	8.3	8.3	8.3
	Agree	52	39.1	39.4	47.7
	Disagree	8	6.0	6.1	53.8
	Not Applicable	61	45.9	46.2	100.0
	Total	132	99.2	100.0	
Missing	System	1	.8		
Total		133	100.0		

- One respondent (1% of total respondents) declined to answer the question.

- Of those who provided a response (132)::
  - 11 respondents (8%) strongly agreed that the involvement of *their client's* e-discovery liaison contributed to a more efficient discovery process;
  - 52 respondents (39%) agreed that their client's liaison contributed to discovery efficiency;
  - 8 respondents (6%) disagreed that their client's liaison contributed to discovery efficiency;
  - No respondents (0%) strongly disagreed that their client's liaison contributed to discovery efficiency;
  - 61 respondents (46%) indicated that the question was "not applicable".

- Of those to whom the question applied (71):
  - 16% selected "strongly agree";
  - 73% selected "agree";
  - 11% selected "disagree".

- Thus, where applicable, 89% of respondents (63) indicated that "my client's e-discovery liaison has contributed to a more efficient discovery process," while only approximately one in ten disagreed with the statement.

b. The involvement of the e-discovery liaison for the other party/parties has contributed to a more efficient discovery process.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Strongly Agree	3	2.3	2.3	2.3
	Agree	27	20.3	20.8	23.1
	Disagree	10	7.5	7.7	30.8
	Strongly Disagree	1	.8	.8	31.5
	Not Applicable	89	66.9	68.5	100.0
	Total	130	97.7	100.0	
Missing	System	3	2.3		
Total		133	100.0		

- Three respondents (2% of total respondents) declined to answer the question.

- Of those who provided a response (130):
  - 3 respondents (2%) strongly agreed that the involvement of the e-discovery liaison for *the other party/parties* contributed to a more efficient discovery process;
  - 27 respondents (21%) agreed that the other party's liaison contributed to discovery efficiency;
  - 10 respondents (8%) disagreed that the other party's liaison contributed to discovery efficiency;
  - One respondent (1%) strongly disagreed that the other party's liaison contributed to discovery efficiency;
  - 89 respondents (69%) indicated that the question was "not applicable".

- Of those to whom the question applied (41):
  - 7% selected "strongly agree";
  - 66% selected "agree";
  - 24% selected "disagree";
  - 2% selected "strongly disagree".

- Thus, where applicable, 73% of respondents (30) indicated that "the involvement of the e-discovery liaison for the other party/parties has contributed to a more efficient discovery process," while 27% (11) disagreed with the statement.

21. How did application of the Principles affect preservations letters?

- □ Discouraged my client from sending preservation letter(s)
- □ Resulted in my client sending more targeted preservation letter(s)
- □ No effect on the issue of preservation letters

How did application of the Principles affect preservation letters?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No effect on the issue of preservation letters	118	88.7	92.9	92.9
	Resulted in my client sending more targeted preservation letter(s)	9	6.8	7.1	100.0
	Total	127	95.5	100.0	
Missing	System	6	4.5		
Total		133	100.0		

- Six respondents (5% of total respondents) declined to answer the question.

- Of those who provided a response (127):
  - 118 respondents (93%) indicated that the Principles had "no effect" on the issue of preservation letters;
  - 9 respondents (7%) indicated that the Principles "resulted in my client sending more targeted preservation letter(s)."
  - No respondents (0%) indicated that the Principles discouraged their client from sending preservation letter(s).

22. Which aspects of the Pilot Program Principles are the most useful?

_____

_____

Which aspects of the Pilot Program Principles are the most useful?

		#	Percent	Valid Percent	Cumulative Percent
Valid	Address issues early; avoid spoliation; forces parties to focus e-discovery and preservation letters.	1	.8	1.8	1.8
	Appointment of liaison.	1	.8	1.8	3.5
	Assignment of costs for unnecessary/special processing of ESI to the requesting party.	1	.8	1.8	5.3
	Before we received notification of the Pilot Program, the parties began extensive discussions regarding the cost and procedures for mirroring the individual defendants computers. Those discussions resulted eventually resulted in an agreed protocol that was submitted to the court for an order, which the court entered. The mirroring of all 5 individual defendants' occurred; and searches were begun on 4 individual defendants' mirror images (but not of the image of my client's hard drive); however, the case settled before any review by defendants for privilege and before plaintiff received the results of the searches.	1	.8	1.8	7.0
	Better understanding of not reasonably accessible ESI.	1	.8	1.8	8.8
	Both program manual as well as standing order are excellent.	1	.8	1.8	10.5
	Clear expectations are set out.	1	.8	1.8	12.3
	Discussions re production, searches, spoliation.	1	.8	1.8	14.0
	Don't know much about it. This was a very limited case and e-discovery was not driven by the principles.	1	.8	1.8	15.8
	E-discovery liaisons.	1	.8	1.8	17.5
	Early involvement of the magistrate Judge assigned to handle discovery.	1	.8	1.8	19.3
	Encouraging the parties to deal with E-discovery at an early stage.	1	.8	1.8	21.1
	Endorsement of proportionality principles.	1	.8	1.8	22.8
	Explicit discussion of the need to ensure proportionality -- in our cases, the burden of ESI discovery falls almost exclusively on the defendants and the Court needs to recognize that and take steps to actively restrict plaintiff discovery, which the Pilot Program encourages.	1	.8	1.8	24.6
	Focusing lawyers on the correct issues and the likely judicial responses to those issues.	1	.8	1.8	26.3

	Getting parties to focus on e-discovery early by highlighting issues in a case up front.	1	.8	1.8	28.1
	I do not feel that the Pilot Principles changed the ESI issues in my cases(s). The designated person to address these issues was helpful.	1	.8	1.8	29.8
	I think in the right kind of cases this makes sense, but not all.	1	.8	1.8	31.6
	If e-Discovery is anticipated, the Principles must be disseminated immediately.	1	.8	1.8	33.3
	In the case I am handling, e-discovery is not a major factor so the Pilot Program Principles have not been tested.	1	.8	1.8	35.1
	Increase of transferable data by email.	1	.8	1.8	36.8
	Insufficient experience with them to comment meaningfully.	1	.8	1.8	38.6
	It forces the party to discuss e-discovery at the beginning of the case and will probably help to reduce discovery disputes later on in litigation.	1	.8	1.8	40.4
	It really is not applicable to this case.	1	.8	1.8	42.1
	It simple message that counsel should make every effort to agree to the process; and consequent fear that if counsel is not cooperative, he might be disciplined by a magistrate.	1	.8	1.8	43.9
	It streamlined the process.	1	.8	1.8	45.6
	Mandatory cooperation amongst counsel.	1	.8	1.8	47.4
	Merely focusing the parties' and the Courts' attention on these issues has been helpful in moving the case forward more efficiently and saving my client money.	1	.8	1.8	49.1
	N/A	1	.8	1.8	50.9
	N/A in this case. Could certainly use it in other cases.	1	.8	1.8	52.6
	No comment.	1	.8	1.8	54.4
	No comment at this time.	1	.8	1.8	56.1
	No comment, the case settled before any meaningful e-discovery issues were addressed.	1	.8	1.8	57.9
	Not applicable. The case that was initiated was dismissed on motion	1	.8	1.8	59.6
	Our case ended up having no e-discovery issues	1	.8	1.8	61.4
	Principle 2.01(a)(1)-(2).	1	.8	1.8	63.2
	Production format.	1	.8	1.8	64.9
	Promoting cooperation and understanding before disputes arise and when egos have flared.	1	.8	1.8	66.7
	Prompting discussion amongst the parties at an early stage about e-discovery.	1	.8	1.8	68.4
	So far, I like them all.	1	.8	1.8	70.2

	The detailed clarification of the obligations of the parties is helpful.	1	.8	1.8	71.9
	The focus on proportionality actually caused the parties in my case to determine that e discovery would not be necessary except on limited issues as the expense of retrieving emails would not likely be justified by the information they would contain. Obviously not a typical case.	1	.8	1.8	73.7
	The initial discussions between and among counsel are the most useful.	1	.8	1.8	75.4
	The Pilot Program gives litigants some much needed direction and standards in what previously was uncharted territory. Hopefully other districts will follow the 7th Circuit's lead.	1	.8	1.8	77.2
	The pilot program is only useful in that it can be used to identify only the needed ESI, and can be used to weed out e-discovery gibberish and empty files. Thus, for cases that anticipate large amounts of ESI, it is useful.	1	.8	1.8	78.9
	The program principles have not had any material effect since most of the discovery in this litigation has not been ESI.	1	.8	1.8	80.7
	The proportionality standards.	1	.8	1.8	82.5
	The repeated encouragement of the parties to work together without the court's involvement.	1	.8	1.8	84.2
	The willingness of the Magistrate Judge to really take on the issue and focus the parties.	1	.8	1.8	86.0
	Their mere existence provides a welcome framework that helps structure e-discovery dialogue between counsel.	1	.8	1.8	87.7
	Unable to determine at this time.	1	.8	1.8	89.5
	Unknown at this time.	1	.8	1.8	91.2
	We are very early in the process, so how the Principles bear out in the case remain to be seen.	1	.8	1.8	93.0
	We became part of the Pilot Program after much of the early planning was done, after the original data collection was done, and after the parties had negotiated custodians and some preliminary keyword searches. Thus it did not have as much of an effect as it might otherwise have had.	1	.8	1.8	94.7
	We better focused the hard drives we wanted to search for deleted information as a result of the Principles.	1	.8	1.8	96.5
	While my pilot case does not really require intensive ESI discovery, my general experience in business litigation makes me a great supporter of these sorts of efforts.	1	.8	1.8	98.2

	Your survey form did not allow me to select the correct stage of proceeding for when case became part of program. The answer to both was "discovery" but survey did not allow this. The opposing counsel, who represent a large corporation, have generally refused to follow any established e-discovery procedures. Because of the nature of the disputes, we have not been able to resolve them comprehensively.	1	.8	1.8	100.0
	Total	57	42.9	100.0	
Missing	System	76	57.1		
Total		133	100.0		

- While 76 respondents (57%) declined to comment, 57 respondents (43%) provided a response on the most useful aspects of the Principles.

- Of those who provided a response (57):
  - 39 respondents (68%) commented on the substance of the Principles;
  - 18 respondents (32%) did not comment on the substance of the Principles, but rather indicated why a comment could not be provided (no e-discovery in the case, too early to tell, etc.).

23. How could the Pilot Program Principles be improved?

_____

_____

How could the Pilot Program Principles be improved?

		#	Percent	Valid Percent	Cumulative Percent
Valid	A party must be allowed to get very detailed meta-data in appropriate cases.	1	.8	2.1	2.1
	Availability of a special master type of advisor for developing keywords for ESI searches.	1	.8	2.1	4.2
	Continue to educate the Judges and the Bar about creative ways to make ESI discovery fair to both sides and reduce costs.	1	.8	2.1	6.3
	Discovery in my case has been stayed pending ruling on a motion. I will better be able to answer this question when discovery starts back up.	1	.8	2.1	8.3
	Don't force the Program on all cases; this case, for example, is not an ideal case for the application of the Principles.	1	.8	2.1	10.4
	Effective sanctions for non-compliance.	1	.8	2.1	12.5
	Figuring out a way to put some additional teeth into noncompliance would improve the Principles. The biggest challenge that we have had in conducting e-discovery in our case has been the other side's lack of cooperation in collecting and appropriately producing ESI.	1	.8	2.1	14.6
	Find some way to make discovery less adversarial, diminish fear of immediate adverse resolution of case because of discovery.	1	.8	2.1	16.7
	Giving specific examples of how to come up with specific word searches.	1	.8	2.1	18.8
	Greater enforcement penalties.	1	.8	2.1	20.8
	I did not even know it existed.	1	.8	2.1	22.9
	In the case I am handling, e-discovery is not a major factor so the Pilot Program Principles have not been tested to determine how it could be improved.	1	.8	2.1	25.0
	Include a presumption that costs will be shared.	1	.8	2.1	27.1
	Insufficient experience with them to comment meaningfully.	1	.8	2.1	29.2
	It is too early in my litigation to provide meaningful feedback on this issue right now.	1	.8	2.1	31.3
	It would be helpful to have the Court take a more active role early on in developing an e-discovery protocol rather than having the parties try and do it, with set dates by which e-discovery is completed.	1	.8	2.1	33.3

	It would be unfair to comment without more experience because the perceived shortcomings that I see in the rules may be overcome by the way they are applied and the willingness of the court to make parties (particularly when they are disproportionately impacted by the burdens of e-discovery) limit the scope of requests depending on the gravity of the issues involved.	1	.8	2.1	35.4
	It's probably too costly, but I believe that it would be helpful to require counsel to sit down together with a mediator - before they serve their discovery requests - in order to verbally justify each and every request with respect to scope and with respect to how or if each request will produce information related to the claims. We play too many discovery games. We need to be forced to make the discovery process "lean and mean" so that it will become reasonable and cost efficient.	1	.8	2.1	37.5
	Make it a Local Rule as soon as possible. This would greatly help in other cases. It just was not as applicable in this case.	1	.8	2.1	39.6
	More active court management of discovery and imposition of limits; discovery is a privilege, not an entitlement.	1	.8	2.1	41.7
	More cost shifting in whole or in part. Still too easy for a party to ask for mountains of information that costs the other side too much. 50/50 splits would curtail abuse more and cause parties to work together better and get to the real information quicker and more efficiently	1	.8	2.1	43.8
	More educational programs without intensive and boring readings.	1	.8	2.1	45.8
	N/A	1	.8	2.1	47.9
	Need to address a deadline/methodology for outstanding search term and other challenges to be brought to the court's attention.	1	.8	2.1	50.0
	No comment.	2	1.5	4.2	54.2
	No comment, the case settled before any meaningful e-discovery issues were addressed.	1	.8	2.1	56.3
	No e-discovery complications in our case to date, so we haven't had to apply them beyond the parties' Rule 26(f) conference.	1	.8	2.1	58.3
	No recommendations.	1	.8	2.1	60.4
	No suggestions so far. It is a good follow on to the Sedona principles.	1	.8	2.1	62.5
	No suggestions, at this point in time.	1	.8	2.1	64.6
	Not applicable as the case was dismissed on motion.	1	.8	2.1	66.7
	Our case ended up having no e-discovery issues.	1	.8	2.1	68.8

	Provide clear guidance on principles at outset of case, as a model if not selected for the Pilot Program.	1	.8	2.1	70.8
	Provide sample discovery requests and a sample protocol for the production of ESI.	1	.8	2.1	72.9
	Putting penalties on a party that uses it, technically, to stall and try to thwart release of documents in custody and control that are vital to the opponent's case.	1	.8	2.1	75.0
	Refine standing order to reflect current technology trends.	1	.8	2.1	77.1
	Selective application to complex cases only. Simple cases do not need to be made more complicated.	1	.8	2.1	79.2
	Since the discovery in this case is not ESI the Program Principles have not been involved to any large extent and therefore it is hard to assess how they can be improved based on this case	1	.8	2.1	81.3
	Smaller cases and clients will suffer dramatically from this program. In two cases that I have had, we sought very specific metadata that proved to be lynchpins in the litigation. None of this data was sought from the beginning because its existence was unknown, and, had it been known, we did not have enough information at the outset of the litigation to justify any order to protect the information. Thus, the biggest problem I have with the pilot program is that is almost impossible to determine the scope of e-discovery at the rule 16 conference because the parties are basically being asked to determine what, if any ESI will be RELEVANT, in terms of rule 34, not what is discoverable under rule 26. Further, another problem that I would anticipate from making e-discovery determinations at the beginning of litigation a required component of a rule 16 conference is that it will give some counsel the idea that he/she needs the electronic information when he/she does not. There are many municipalities that will suffer greatly in this regard. Either way, the program as a whole is not well suited for cases other than those involving corporate giants.	1	.8	2.1	83.3
	The pilot program principles are not applicable in all cases, especially less complex cases where none of the parties intend on engaging in e-discovery. The program should be targeted to cases in which e-discovery is likely to take place.	1	.8	2.1	85.4

	The Pilot Program Principles could be improved in several ways, as suggested below: 1. Only one good faith effort to confer required per discovery dispute; 2. The court must expeditiously rule on any dispute brought to its attention after efforts to confer have failed. The Principles must take into consideration that there are times when one party refuses to answer discovery, efforts to cooperate become fruitless, and a ruling is needed from the court. The Principles emphasize that zealous advocacy and cooperation between parties are not mutually exclusive, which is an excellent point. The problem remains, however, that many judges now equate a failure to resolve issues with recalcitrance and unprofessionalism, and just as zealous advocacy and cooperation are not mutually exclusive, so a failure to resolve issues without the court's assistance is not always tantamount to a lack of professionalism. Sometimes, like it or not, judges have to decide discovery disputes; sometimes parties have genuine disagreements; and often, despite the best efforts of counsel, parties will see it as in their interest to stonewall and avoid discovery obligations, especially where that stonewalling has no meaningful consequence. When judges abdicate their role in deciding discovery disputes as many of them now do - as, for example, by always assuming that calling on the court's resources and assistance means that both parties have failed to work cooperatively - they give inordinate power to a party who wants to resist discovery, and at the same time they demean the integrity of the entire discovery process. The Principles should not be used as an excuse to abdicate judicial supervision of discovery. For this reason, we suggest that only one good faith effort to confer be required per discovery dispute and that the court must expeditiously rule on any dispute brought to its attention after efforts to confer have failed. The court must take into consideration which party has control of most of the proof in determining what electronic discovery to allow and must be particularly careful when ruling in a type of case in which many summary judgment motions are granted, such as employment discrimination cases. There is another problem with the Principles, and with discovery in the Seventh Circuit in general. A large part of the reason that discovery has become so expensive and time-consuming is that the courts, particularly in employment disputes, now routinely grant summary judgment to defendants - especially in employment cases - unless the plaintiff has a fully developed record with which to meet a summary judgment motion. This practice, and Local Rule 56 and its requirements, effectively requires that plaintiffs try their case twice - once on paper at the summary judgment stage to	1	.8	2.1	87.5

	The principles must be discussed at the first status conference if not raised by the parties during their Rule 26(f) report.	1	.8	2.1	89.6
	There is a lot of emphasis on cooperation, but not as much on proportionality, and proportionality is the very difficult issue. We ended up with over 4000 keywords over my client's repeated objections, but a judge has very little to rely on in attempting to pare down such mammoth requests.	1	.8	2.1	91.7
	Unable to determine at this time.	1	.8	2.1	93.8
	Unknown at this time.	1	.8	2.1	95.8
	Wider dissemination.	1	.8	2.1	97.9
	With the scope of discovery so broad, but the cost of e-discovery so burdensome, the Principals should do more to ensure that the requesting party bears a fair portion of the cost of what they are seeking.	1	.8	2.1	100.0
	Total	48	36.1	100.0	
Missing	System	85	63.9		
Total		133	100.0		

- 48 respondents (36%) provided a response, while 85 respondents (64%) declined to comment.

- Of those who commented (48):
  - Approximately 32 respondents (67%) provided feedback on the Principles;
  - Approximately 16 respondents (33%) did not provide feedback on the Principles.

PART II: EVALUATION OF THE PRINCIPLES BY RESPONDENT GROUP

Question 17a: Please assess how application of the Pilot Program Principles has affected (or likely will affect) the level of cooperation exhibited by counsel to efficiently resolve the case.

17a RESPONSES BY PARTY REPRESENTED

PARTY REPRESENTED	RESPONSE TO QUESTION 17a		Frequency	Percent	Valid Percent	Cumulative Percent
No party selected	Valid	No Effect	1	100.0	100.0	100.0
Multiple defendants	Valid	Greatly Increased	1	3.8	4.0	4.0
		Increased	9	34.6	36.0	40.0
		No Effect	15	57.7	60.0	100.0
		Total	25	96.2	100.0	
	Missing	(No response)	1	3.8		
	Total		26	100.0		
Multiple plaintiffs	Valid	Greatly Increased	1	3.7	3.8	3.8
		Increased	6	22.2	23.1	26.9
		No Effect	19	70.4	73.1	100.0
		Total	26	96.3	100.0	
	Missing	(No response)	1	3.7		
	Total		27	100.0		
Single defendant	Valid	Greatly Decreased	1	2.5	2.7	2.7
		Increased	17	42.5	45.9	48.6
		No Effect	19	47.5	51.4	100.0
		Total	37	92.5	100.0	
	Missing	(No response)	3	7.5		
	Total		40	100.0		
Single plaintiff	Valid	Increased	10	25.6	25.6	25.6
		No Effect	29	74.4	74.4	100.0
		Total	39	100.0	100.0	

- Reported effect of the Principles on the level of counsel's cooperation, answers separated by party represented in the Pilot Program case (excluding those who declined to answer):
  - NO EFFECT – 74% single plaintiff; 73% multiple plaintiffs; 51% single defendant; 60% multiple defendants;
  - INCREASED (to any extent) – 26% single plaintiff; 27% multiple plaintiffs; 46% single defendant; 40% multiple defendants;
  - DECREASED (to any extent) – 0% single plaintiff; 0% multiple plaintiffs; 3% single defendant; 0% multiple defendants.

17a RESPONSES BY CLIENT'S E-DISCOVERY ROLE

CLIENT'S E-DISCOVERY ROLE	RESPONSE TO QUESTION 17a		Frequency	Percent	Valid Percent	Cumulative Percent
No role selected	Valid	No Effect	1	100.0	100.0	100.0
Equally a requesting and a producing party	Valid	Increased	8	24.2	25.0	25.0
		No Effect	24	72.7	75.0	100.0
		Total	32	97.0	100.0	
	Missing	(No response)	1	3.0		
	Total		33	100.0		
Neither a requesting nor a producing party	Valid	Increased	3	33.3	33.3	33.3
		No Effect	6	66.7	66.7	100.0
		Total	9	100.0	100.0	
Primarily a producing party	Valid	Greatly Decreased	1	2.2	2.3	2.3
		Greatly Increased	1	2.2	2.3	4.7
		Increased	21	45.7	48.8	53.5
		No Effect	20	43.5	46.5	100.0
		Total	43	93.5	100.0	
	Missing	(No response)	3	6.5		
	Total		46	100.0		
Primarily a requesting party	Valid	Greatly Increased	1	2.3	2.3	2.3
		Increased	10	22.7	23.3	25.6
		No Effect	32	72.7	74.4	100.0
		Total	43	97.7	100.0	
	Missing	(No response)	1	2.3		
	Total		44	100.0		

- Reported effect of the Principles on the level of counsel's cooperation, answers separated by the client's e-discovery role (excluding those who declined to answer):
  - NO EFFECT – 74% requesting party; 47% producing party; 75% equally requesting and producing; 67% neither requesting nor producing;
  - INCREASED (to any extent) – 26% requesting party; 51% producing party; 25% equally requesting and producing; 33% neither requesting nor producing;
  - DECREASED (to any extent) – 0% requesting party; 2% producing party; 0% equally requesting and producing; 0% neither requesting nor producing.

17a RESPONSES BY WHETHER THE CLIENT'S ESI CONNECTED WITH THE PILOT PROGRAM CASE PRESENTED A PARTICULAR CHALLENGE

CLIENT'S ESI IN THE CASE	RESPONSE TO QUESTION 17a		Frequency	Percent	Valid Percent	Cumulative Percent
No particularly challenging categories of ESI	Valid	Increased	6	23.1	25.0	25.0
		No Effect	18	69.2	75.0	100.0
		Total	24	92.3	100.0	
	Missing	(No response)	2	7.7		
	Total		26	100.0		
One or more of the following: high volume of data; legacy data; disaster recovery data; segregated data; automatically updated data; structured data; foreign data	Valid	Greatly Decreased	1	.9	1.0	1.0
		Greatly Increased	2	1.9	1.9	2.9
		Increased	36	33.6	34.6	37.5
		No Effect	65	60.7	62.5	100.0
		Total	104	97.2	100.0	
	Missing	(No response)	3	2.8		
	Total		107	100.0		

- Reported effect of the Principles on the level of counsel's cooperation, answers separated by the client's ESI connected with the Pilot Program case (excluding those who declined to answer):
  - NO EFFECT – 75% no challenging ESI categories; 63% one or more challenging ESI categories;
  - INCREASED (to any extent) – 25% no challenging ESI categories; 37% one or more challenging ESI categories;
  - DECREASED (to any extent) – 0% no challenging ESI categories; 1% one or more challenging ESI categories.

Question 17b: Please assess how application of the Pilot Program Principles has affected (or likely will affect) your ability to zealously represent your client.

17b RESPONSES BY PARTY REPRESENTED

PARTY REPRESENTED	RESPONSE TO QUESTION 17b		Frequency	Percent	Valid Percent	Cumulative Percent
No party selected	Valid	No Effect	1	100.0	100.0	100.0
Multiple defendants	Valid	Greatly Increased	2	7.7	7.7	7.7
		Increased	3	11.5	11.5	19.2
		No Effect	21	80.8	80.8	100.0
		Total	26	100.0	100.0	
Multiple plaintiffs	Valid	Increased	7	25.9	28.0	28.0
		No Effect	18	66.7	72.0	100.0
		Total	25	92.6	100.0	
	Missing	(No response)	2	7.4		
	Total		27	100.0		
Single defendant	Valid	Decreased	2	5.0	5.6	5.6
		Greatly Increased	1	2.5	2.8	8.3
		Increased	9	22.5	25.0	33.3
		No Effect	24	60.0	66.7	100.0
		Total	36	90.0	100.0	
	Missing	(No response)	4	10.0		
	Total		40	100.0		
Single plaintiff	Valid	Decreased	2	5.1	5.1	5.1
		Greatly Decreased	1	2.6	2.6	7.7
		Greatly Increased	1	2.6	2.6	10.3
		Increased	5	12.8	12.8	23.1
		No Effect	30	76.9	76.9	100.0
		Total	39	100.0	100.0	

- Reported effect of the Principles on the ability to zealously represent the client, answers separated by party represented in the Pilot Program case (excluding those who declined to answer):
  - NO EFFECT – 77% single plaintiff; 72% multiple plaintiffs; 67% single defendant; 81% multiple defendants;
  - INCREASED (to any extent) – 15% single plaintiff; 28% multiple plaintiffs; 28% single defendant; 12% multiple defendants;

- DECREASED (to any extent) – 8% single plaintiff; 0% multiple plaintiffs; 6% single defendant; 0% multiple defendants.

17b RESPONSES BY CLIENT'S E-DISCOVERY ROLE

CLIENT'S E-DISCOVERY ROLE	RESPONSE TO QUESTION 17b		Frequency	Percent	Valid Percent	Cumulative Percent
No role selected	Valid	No Effect	1	100.0	100.0	100.0
Equally a requesting and a producing party	Valid	Greatly Increased	1	3.0	3.0	3.0
		Increased	5	15.2	15.2	18.2
		No Effect	27	81.8	81.8	100.0
		Total	33	100.0	100.0	
Neither a requesting nor a producing party	Valid	No Effect	9	100.0	100.0	100.0
Primarily a producing party	Valid	Decreased	3	6.5	7.1	7.1
		Greatly Increased	2	4.3	4.8	11.9
		Increased	9	19.6	21.4	33.3
		No Effect	28	60.9	66.7	100.0
		Total	42	91.3	100.0	
	Missing	(No response)	4	8.7		
	Total		46	100.0		
Primarily a requesting party	Valid	Decreased	1	2.3	2.4	2.4
		Greatly Decreased	1	2.3	2.4	4.8
		Greatly Increased	1	2.3	2.4	7.1
		Increased	10	22.7	23.8	31.0
		No Effect	29	65.9	69.0	100.0
		Total	42	95.5	100.0	
	Missing	(No response)	2	4.5		
	Total		44	100.0		

- Reported effect of the Principles on the ability to zealously represent the client, answers separated by the client's e-discovery role (excluding those who declined to answer):
  - NO EFFECT – 69% requesting party; 67% producing party; 82% equally requesting and producing; 100% neither requesting nor producing;
  - INCREASED (to any extent) – 26% requesting party; 26% producing party; 18% equally requesting and producing; 0% neither requesting nor producing;
  - DECREASED (to any extent) – 5% requesting party; 7% producing party; 0% equally requesting and producing; 0% neither requesting nor producing.

17b RESPONSES BY WHETHER THE CLIENT'S ESI CONNECTED WITH THE PILOT PROGRAM CASE PRESENTED A PARTICULAR CHALLENGE

CLIENT'S ESI IN THE CASE	RESPONSE TO QUESTION 17b		Frequency	Percent	Valid Percent	Cumulative Percent
No particularly challenging categories of ESI	Valid	Decreased	1	3.8	4.2	4.2
		Increased	2	7.7	8.3	12.5
		No Effect	21	80.8	87.5	100.0
		Total	24	92.3	100.0	
	Missing	(No response)	2	7.7		
	Total		26	100.0		
One or more of the following: high volume of data; legacy data; disaster recovery data; segregated data; automatically updated data; structured data; foreign data	Valid	Decreased	3	2.8	2.9	2.9
		Greatly Decreased	1	.9	1.0	3.9
		Greatly Increased	4	3.7	3.9	7.8
		Increased	22	20.6	21.4	29.1
		No Effect	73	68.2	70.9	100.0
		Total	103	96.3	100.0	
	Missing	(No response)	4	3.7		
	Total		107	100.0		

- Reported effect of the Principles on the ability to zealously represent the client, answers separated by the client's ESI connected with the Pilot Program case (excluding those who declined to answer):
  - NO EFFECT – 88% no challenging ESI categories; 71% one or more challenging ESI categories;
  - INCREASED (to any extent) – 8% no challenging ESI categories; 25% one or more challenging ESI categories;
  - DECREASED (to any extent) – 4% no challenging ESI categories; 4% one or more challenging ESI categories.

Question 17d: Please assess how application of the Pilot Program Principles has affected (or likely will affect) the parties' ability to resolve e-discovery disputes without court involvement.

17d RESPONSES BY PARTY REPRESENTED

PARTY REPRESENTED	RESPONSE TO QUESTION 17d		Frequency	Percent	Valid Percent	Cumulative Percent
No party selected	Valid	No Effect	1	100.0	100.0	100.0
Multiple defendants	Valid	Greatly Increased	1	3.8	4.2	4.2
		Increased	11	42.3	45.8	50.0
		No Effect	12	46.2	50.0	100.0
		Total	24	92.3	100.0	
	Missing	(No response)	2	7.7		
	Total		26	100.0		
Multiple plaintiffs	Valid	Greatly Increased	1	3.7	3.8	3.8
		Increased	9	33.3	34.6	38.5
		No Effect	16	59.3	61.5	100.0
		Total	26	96.3	100.0	
	Missing	(No response)	1	3.7		
	Total		27	100.0		
Single defendant	Valid	Increased	13	32.5	35.1	35.1
		No Effect	24	60.0	64.9	100.0
		Total	37	92.5	100.0	
	Missing	(No response)	3	7.5		
	Total		40	100.0		
Single plaintiff	Valid	Decreased	1	2.6	2.6	2.6
		Increased	14	35.9	35.9	38.5
		No Effect	24	61.5	61.5	100.0
		Total	39	100.0	100.0	

- Reported effect of the Principles on the ability to resolve e-discovery disputes without court involvement, answers separated by party represented in the Pilot Program case (excluding those who declined to answer):
  - NO EFFECT – 62% single plaintiff; 62% multiple plaintiffs; 65% single defendant; 50% multiple defendants;
  - INCREASED (to any extent) – 36% single plaintiff; 39% multiple plaintiffs; 35% single defendant; 50% multiple defendants;
  - DECREASED (to any extent) – 3% single plaintiff; 0% multiple plaintiffs; 0% single defendant; 0% multiple defendants.

17d RESPONSES BY CLIENT'S E-DISCOVERY ROLE

CLIENT'S E-DISCOVERY ROLE	RESPONSE TO QUESTION 17d		Frequency	Percent	Valid Percent	Cumulative Percent
No role selected	Valid	No Effect	1	100.0	100.0	100.0
Equally a requesting and a producing party	Valid	Increased	10	30.3	32.3	32.3
		No Effect	21	63.6	67.7	100.0
		Total	31	93.9	100.0	
	Missing	(No response)	2	6.1		
	Total		33	100.0		
Neither a requesting nor a producing party	Valid	No Effect	9	100.0	100.0	100.0
Primarily a producing party	Valid	Greatly Increased	1	2.2	2.3	2.3
		Increased	23	50.0	53.5	55.8
		No Effect	19	41.3	44.2	100.0
		Total	43	93.5	100.0	
	Missing	(No response)	3	6.5		
	Total		46	100.0		
Primarily a requesting party	Valid	Decreased	1	2.3	2.3	2.3
		Greatly Increased	1	2.3	2.3	4.7
		Increased	14	31.8	32.6	37.2
		No Effect	27	61.4	62.8	100.0
		Total	43	97.7	100.0	
	Missing	(No response)	1	2.3		
	Total		44	100.0		

- Reported effect of the Principles on the ability to resolve e-discovery disputes without court involvement, answers separated by the client's e-discovery role (excluding those who declined to answer):
  - NO EFFECT – 63% requesting party; 44% producing party; 68% equally requesting and producing; 100% neither requesting nor producing;
  - INCREASED (to any extent) – 35% requesting party; 56% producing party; 32% equally requesting and producing; 0% neither requesting nor producing;
  - DECREASED (to any extent) – 2% requesting party; 0% producing party; 0% equally requesting and producing; 0% neither requesting nor producing.

17d RESPONSES BY WHETHER THE CLIENT'S ESI CONNECTED WITH THE PILOT PROGRAM CASE PRESENTED A PARTICULAR CHALLENGE

CLIENT'S ESI IN THE CASE	RESPONSE TO QUESTION 17d		Frequency	Percent	Valid Percent	Cumulative Percent
No particularly challenging categories of ESI	Valid	Increased	6	23.1	25.0	25.0
		No Effect	18	69.2	75.0	100.0
		Total	24	92.3	100.0	
	Missing	(No response)	2	7.7		
	Total		26	100.0		
One or more of the following: high volume of data; legacy data; disaster recovery data; segregated data; automatically updated data; structured data; foreign data	Valid	Decreased	1	.9	1.0	1.0
		Greatly Increased	2	1.9	1.9	2.9
		Increased	41	38.3	39.8	42.7
		No Effect	59	55.1	57.3	100.0
		Total	103	96.3	100.0	
	Missing	(No response)	4	3.7		
	Total		107	100.0		

- Reported effect of the Principles on the ability to resolve e-discovery disputes without court involvement, answers separated by the client's ESI connected with the Pilot Program case (excluding those who declined to answer):
  - NO EFFECT – 75% no challenging ESI categories; 57% one or more challenging ESI categories;
  - INCREASED (to any extent) – 25% no challenging ESI categories; 42% one or more challenging ESI categories;
  - DECREASED (to any extent) – 0% no challenging ESI categories; 1% one or more challenging ESI categories.

Question 17e: Please assess how application of the Pilot Program Principles has affected (or likely will affect) the fairness of the e-discovery process.

17e RESPONSES BY PARTY REPRESENTED

PARTY REPRESENTED	RESPONSE TO QUESTION 17e		Frequency	Percent	Valid Percent	Cumulative Percent
No party selected	Valid	No Effect	1	100.0	100.0	100.0
Multiple defendants	Valid	Decreased	1	3.8	4.0	4.0
		Greatly Increased	2	7.7	8.0	12.0
		Increased	14	53.8	56.0	68.0
		No Effect	8	30.8	32.0	100.0
		Total	25	96.2	100.0	
	Missing	(No response)	1	3.8		
	Total		26	100.0		
Multiple plaintiffs	Valid	Greatly Increased	2	7.4	8.0	8.0
		Increased	10	37.0	40.0	48.0
		No Effect	13	48.1	52.0	100.0
		Total	25	92.6	100.0	
	Missing	(No response)	2	7.4		
	Total		27	100.0		
Single defendant	Valid	Greatly Increased	3	7.5	8.1	8.1
		Increased	14	35.0	37.8	45.9
		No Effect	20	50.0	54.1	100.0
		Total	37	92.5	100.0	
	Missing	(No response)	3	7.5		
	Total		40	100.0		
Single plaintiff	Valid	Decreased	1	2.6	2.6	2.6
		Greatly Decreased	1	2.6	2.6	5.3
		Increased	9	23.1	23.7	28.9
		No Effect	27	69.2	71.1	100.0
		Total	38	97.4	100.0	
	Missing	(No response)	1	2.6		
	Total		39	100.0		

- Reported effect of the Principles on the fairness of the e-discovery process, answers separated by party represented in the Pilot Program case (excluding those who declined to answer):

- NO EFFECT – 71% single plaintiff; 52% multiple plaintiffs; 54% single defendant; 32% multiple defendants;
- INCREASED (to any extent) – 24% single plaintiff; 48% multiple plaintiffs; 46% single defendant; 64% multiple defendants;
- DECREASED (to any extent) – 5% single plaintiff; 0% multiple plaintiffs; 0% single defendant; 4% multiple defendants.

17e RESPONSES BY CLIENT'S E-DISCOVERY ROLE

CLIENT'S E-DISCOVERY ROLE	RESPONSE TO QUESTION 17e		Frequency	Percent	Valid Percent	Cumulative Percent
No role selected	Valid	No Effect	1	100.0	100.0	100.0
Equally a requesting and a producing party	Valid	Decreased	1	3.0	3.1	3.1
		Greatly Increased	1	3.0	3.1	6.3
		Increased	11	33.3	34.4	40.6
		No Effect	19	57.6	59.4	100.0
		Total	32	97.0	100.0	
	Missing	(No response)	1	3.0		
	Total		33	100.0		
Neither a requesting nor a producing party	Valid	Increased	4	44.4	44.4	44.4
		No Effect	5	55.6	55.6	100.0
		Total	9	100.0	100.0	
Primarily a producing party	Valid	Greatly Increased	4	8.7	9.3	9.3
		Increased	19	41.3	44.2	53.5
		No Effect	20	43.5	46.5	100.0
		Total	43	93.5	100.0	
	Missing	(No response)	3	6.5		
	Total		46	100.0		
Primarily a requesting party	Valid	Decreased	1	2.3	2.4	2.4
		Greatly Decreased	1	2.3	2.4	4.9
		Greatly Increased	2	4.5	4.9	9.8
		Increased	13	29.5	31.7	41.5
		No Effect	24	54.5	58.5	100.0
		Total	41	93.2	100.0	
	Missing	(No response)	3	6.8		
	Total		44	100.0		

- Reported effect of the Principles on the fairness of the e-discovery process, answers separated by the client's e-discovery role (excluding those who declined to answer):
  - NO EFFECT – 59% requesting party; 47% producing party; 59% equally requesting and producing; 56% neither requesting nor producing;
  - INCREASED (to any extent) – 37% requesting party; 54% producing party; 38% equally requesting and producing; 44% neither requesting nor producing;
  - DECREASED (to any extent) – 5% requesting party; 0% producing party; 3% equally requesting and producing; 0% neither requesting nor producing.

17e RESPONSES BY WHETHER THE CLIENT'S ESI CONNECTED WITH THE PILOT PROGRAM CASE PRESENTED A PARTICULAR CHALLENGE

CLIENT'S ESI IN THE CASE	RESPONSE TO QUESTION 17e		Frequency	Percent	Valid Percent	Cumulative Percent
No particularly challenging categories of ESI	Valid	Increased	7	26.9	30.4	30.4
		No Effect	16	61.5	69.6	100.0
		Total	23	88.5	100.0	
	Missing	(No response)	3	11.5		
	Total		26	100.0		
One or more of the following: high volume of data; legacy data; disaster recovery data; segregated data; automatically updated data; structured data; foreign data	Valid	Decreased	2	1.9	1.9	1.9
		Greatly Decreased	1	.9	1.0	2.9
		Greatly Increased	7	6.5	6.8	9.7
		Increased	40	37.4	38.8	48.5
		No Effect	53	49.5	51.5	100.0
		Total	103	96.3	100.0	
	Missing	(No response)	4	3.7		
	Total		107	100.0		

- Reported effect of the Principles on the fairness of the e-discovery process, answers separated by the client's ESI connected with the Pilot Program case (excluding those who declined to answer):
  - NO EFFECT – 70% no challenging ESI categories; 52% one or more challenging ESI categories;
  - INCREASED (to any extent) – 30% no challenging ESI categories; 46% one or more challenging ESI categories;
  - DECREASED (to any extent) – 0% no challenging ESI categories; 3% one or more challenging ESI categories.

Question 17f: Please assess how application of the Pilot Program Principles has affected (or likely will affect) your ability to obtain relevant documents.

17f RESPONSES BY PARTY REPRESENTED

PARTY REPRESENTED	RESPONSE TO QUESTION 17f		Frequency	Percent	Valid Percent	Cumulative Percent
No party selected	Valid	No Effect	1	100.0	100.0	100.0
Multiple defendants	Valid	Increased	6	23.1	25.0	25.0
		No Effect	18	69.2	75.0	100.0
		Total	24	92.3	100.0	
	Missing	(No response)	2	7.7		
	Total		26	100.0		
Multiple plaintiffs	Valid	Greatly Increased	3	11.1	11.5	11.5
		Increased	7	25.9	26.9	38.5
		No Effect	16	59.3	61.5	100.0
		Total	26	96.3	100.0	
	Missing	(No response)	1	3.7		
	Total		27	100.0		
Single defendant	Valid	Increased	12	30.0	33.3	33.3
		No Effect	24	60.0	66.7	100.0
		Total	36	90.0	100.0	
	Missing	(No response)	4	10.0		
	Total		40	100.0		
Single plaintiff	Valid	Decreased	4	10.3	10.5	10.5
		Greatly Decreased	1	2.6	2.6	13.2
		Greatly Increased	1	2.6	2.6	15.8
		Increased	9	23.1	23.7	39.5
		No Effect	23	59.0	60.5	100.0
		Total	38	97.4	100.0	
	Missing	(No response)	1	2.6		
	Total		39	100.0		

- Reported effect of the Principles on the ability to obtain relevant documents, answers separated by party represented in the Pilot Program case (excluding those who declined to answer):
  - NO EFFECT – 61% single plaintiff; 62% multiple plaintiffs; 67% single defendant; 75% multiple defendants;

- INCREASED (to any extent) – 26% single plaintiff; 39% multiple plaintiffs; 33% single defendant; 25% multiple defendants;
- DECREASED (to any extent) – 13% single plaintiff; 0% multiple plaintiffs; 0% single defendant; 0% multiple defendants.

17f RESPONSES BY CLIENT'S E-DISCOVERY ROLE

CLIENT'S E-DISCOVERY ROLE	RESPONSE TO QUESTION 17f		Frequency	Percent	Valid Percent	Cumulative Percent
No role selected	Valid	No Effect	1	100.0	100.0	100.0
Equally a requesting and a producing party	Valid	Decreased	1	3.0	3.1	3.1
		Greatly Increased	1	3.0	3.1	6.3
		Increased	11	33.3	34.4	40.6
		No Effect	19	57.6	59.4	100.0
		Total	32	97.0	100.0	
	Missing	(No response)	1	3.0		
	Total		33	100.0		
Neither a requesting nor a producing party	Valid	Increased	1	11.1	16.7	16.7
		No Effect	5	55.6	83.3	100.0
		Total	6	66.7	100.0	
	Missing	(No response)	3	33.3		
	Total		9	100.0		
Primarily a producing party	Valid	Increased	9	19.6	20.9	20.9
		No Effect	34	73.9	79.1	100.0
		Total	43	93.5	100.0	
	Missing	(No response)	3	6.5		
	Total		46	100.0		
Primarily a requesting party	Valid	Decreased	3	6.8	7.0	7.0
		Greatly Decreased	1	2.3	2.3	9.3
		Greatly Increased	3	6.8	7.0	16.3
		Increased	13	29.5	30.2	46.5
		No Effect	23	52.3	53.5	100.0
		Total	43	97.7	100.0	
	Missing	(No response)	1	2.3		
	Total		44	100.0		

- Reported effect of the Principles on the ability to obtain relevant documents, answers separated by the client's e-discovery role (excluding those who declined to answer):
  - NO EFFECT – 54% requesting party; 79% producing party; 59% equally requesting and producing; 83% neither requesting nor producing;
  - INCREASED (to any extent) – 37% requesting party; 21% producing party; 38% equally requesting and producing; 17% neither requesting nor producing;
  - DECREASED (to any extent) – 9% requesting party; 0% producing party; 3% equally requesting and producing; 0% neither requesting nor producing.

17f RESPONSES BY WHETHER THE CLIENT'S ESI CONNECTED WITH THE PILOT PROGRAM CASE PRESENTED A PARTICULAR CHALLENGE

CLIENT'S ESI IN THE CASE	RESPONSE TO QUESTION 17f		Frequency	Percent	Valid Percent	Cumulative Percent
No particularly challenging categories of ESI	Valid	Increased	5	19.2	23.8	23.8
		No Effect	16	61.5	76.2	100.0
		Total	21	80.8	100.0	
	Missing	(No response)	5	19.2		
	Total		26	100.0		
One or more of the following: high volume of data; legacy data; disaster recovery data; segregated data; automatically updated data; structured data; foreign data	Valid	Decreased	4	3.7	3.8	3.8
		Greatly Decreased	1	.9	1.0	4.8
		Greatly Increased	4	3.7	3.8	8.7
		Increased	29	27.1	27.9	36.5
		No Effect	66	61.7	63.5	100.0
		Total	104	97.2	100.0	
	Missing	(No response)	3	2.8		
	Total		107	100.0		

- Reported effect of the Principles on the ability to obtain relevant documents, answers separated by the client's ESI connected with the Pilot Program case (excluding those who declined to answer):
  - NO EFFECT – 76% no challenging ESI categories; 64% one or more challenging ESI categories;
  - INCREASED (to any extent) – 24% no challenging ESI categories; 32% one or more challenging ESI categories;
  - DECREASED (to any extent) – 0% no challenging ESI categories; 5% one or more challenging ESI categories.

Question 17g: Please assess how application of the Pilot Program Principles has affected (or likely will affect) allegations of spoliation or other sanctionable misconduct regarding the preservation or collection of ESI.

17g RESPONSES BY PARTY REPRESENTED

PARTY REPRESENTED	RESPONSE TO QUESTION 17g		Frequency	Percent	Valid Percent	Cumulative Percent
No party selected	Valid	No Effect	1	100.0	100.0	100.0
Multiple defendants	Valid	Decreased	2	7.7	7.7	7.7
		Increased	3	11.5	11.5	19.2
		No Effect	21	80.8	80.8	100.0
		Total	26	100.0	100.0	
Multiple plaintiffs	Valid	Increased	3	11.1	12.0	12.0
		No Effect	22	81.5	88.0	100.0
		Total	25	92.6	100.0	
	Missing	(No response)	2	7.4		
	Total		27	100.0		
Single defendant	Valid	Decreased	4	10.0	10.8	10.8
		Increased	13	32.5	35.1	45.9
		No Effect	20	50.0	54.1	100.0
		Total	37	92.5	100.0	
	Missing	(No response)	3	7.5		
	Total		40	100.0		
Single plaintiff	Valid	Decreased	3	7.7	7.7	7.7
		Greatly Decreased	2	5.1	5.1	12.8
		Increased	4	10.3	10.3	23.1
		No Effect	30	76.9	76.9	100.0
		Total	39	100.0	100.0	

- Reported effect of the Principles on allegations of sanctionable misconduct, answers separated by party represented in the Pilot Program case (excluding those who declined to answer):
  - NO EFFECT – 77% single plaintiff; 88% multiple plaintiffs; 54% single defendant; 81% multiple defendants;
  - INCREASED (to any extent) – 15% single plaintiff; 12% multiple plaintiffs; 35% single defendant; 12% multiple defendants;
  - DECREASED (to any extent) – 8% single plaintiff; 0% multiple plaintiffs; 11% single defendant; 7% multiple defendants.

17g RESPONSES BY CLIENT'S E-DISCOVERY ROLE

CLIENT'S E-DISCOVERY ROLE	RESPONSE TO QUESTION 17g		Frequency	Percent	Valid Percent	Cumulative Percent
No role selected	Valid	No Effect	1	100.0	100.0	100.0
Equally a requesting and a producing party	Valid	Decreased	3	9.1	9.1	9.1
		Increased	3	9.1	9.1	18.2
		No Effect	27	81.8	81.8	100.0
		Total	33	100.0	100.0	
Neither a requesting nor a producing party	Valid	Decreased	1	11.1	11.1	11.1
		Increased	1	11.1	11.1	22.2
		No Effect	7	77.8	77.8	100.0
		Total	9	100.0	100.0	
Primarily a producing party	Valid	Decreased	4	8.7	9.3	9.3
		Increased	13	28.3	30.2	39.5
		No Effect	26	56.5	60.5	100.0
		Total	43	93.5	100.0	
	Missing	(No response)	3	6.5		
	Total		46	100.0		
Primarily a requesting party	Valid	Decreased	1	2.3	2.4	2.4
		Greatly Decreased	2	4.5	4.8	7.1
		Increased	6	13.6	14.3	21.4
		No Effect	33	75.0	78.6	100.0
		Total	42	95.5	100.0	
	Missing	(No response)	2	4.5		
	Total		44	100.0		

- Reported effect of the Principles on allegations of sanctionable misconduct, answers separated by the client's e-discovery role (excluding those who declined to answer):
  - NO EFFECT – 79% requesting party; 61% producing party; 82% equally requesting and producing; 78% neither requesting nor producing;
  - INCREASED (to any extent) – 14% requesting party; 30% producing party; 9% equally requesting and producing; 11% neither requesting nor producing;
  - DECREASED (to any extent) – 2% requesting party; 3% producing party; 9% equally requesting and producing; 11% neither requesting nor producing.

17g RESPONSES BY WHETHER THE CLIENT'S ESI CONNECTED WITH THE PILOT PROGRAM CASE PRESENTED A PARTICULAR CHALLENGE

CLIENT'S ESI IN THE CASE	RESPONSE TO QUESTION 17g		Frequency	Percent	Valid Percent	Cumulative Percent
No particularly challenging categories of ESI	Valid	Increased	5	19.2	20.8	20.8
		No Effect	19	73.1	79.2	100.0
		Total	24	92.3	100.0	
	Missing	(No response)	2	7.7		
	Total		26	100.0		
One or more of the following: high volume of data; legacy data; disaster recovery data; segregated data; automatically updated data; structured data; foreign data	Valid	Decreased	9	8.4	8.7	8.7
		Greatly Decreased	2	1.9	1.9	10.6
		Increased	18	16.8	17.3	27.9
		No Effect	75	70.1	72.1	100.0
		Total	104	97.2	100.0	
	Missing	(No response)	3	2.8		
	Total		107	100.0		

- Reported effect of the Principles on allegations of sanctionable misconduct, answers separated by the client's ESI connected with the Pilot Program case (excluding those who declined to answer):
  - NO EFFECT – 79% no challenging ESI categories; 72% one or more challenging ESI categories;
  - INCREASED (to any extent) – 21% no challenging ESI categories; 19% one or more challenging ESI categories;
  - DECREASED (to any extent) – 0% no challenging ESI categories; 9% one or more challenging ESI categories.

Question 17h: Please assess how application of the Pilot Program Principles has affected (or likely will affect) discovery with respect to another party's efforts to preserve or collect ESI.

17h RESPONSES BY PARTY REPRESENTED

PARTY REPRESENTED	RESPONSE TO QUESTION 17h		Frequency	Percent	Valid Percent	Cumulative Percent
No party selected	Valid	No Effect	1	100.0	100.0	100.0
Multiple defendants	Valid	Increased	8	30.8	32.0	32.0
		No Effect	17	65.4	68.0	100.0
		Total	25	96.2	100.0	
	Missing	(No response)	1	3.8		
	Total		26	100.0		
Multiple plaintiffs	Valid	Increased	7	25.9	28.0	28.0
		No Effect	18	66.7	72.0	100.0
		Total	25	92.6	100.0	
	Missing	(No response)	2	7.4		
	Total		27	100.0		
Single defendant	Valid	Decreased	1	2.5	2.7	2.7
		Increased	11	27.5	29.7	32.4
		No Effect	25	62.5	67.6	100.0
		Total	37	92.5	100.0	
	Missing	(No response)	3	7.5		
	Total		40	100.0		
Single plaintiff	Valid	Decreased	1	2.6	2.6	2.6
		Greatly Decreased	1	2.6	2.6	5.1
		Greatly Increased	1	2.6	2.6	7.7
		Increased	7	17.9	17.9	25.6
		No Effect	29	74.4	74.4	100.0
		Total	39	100.0	100.0	

- Reported effect of the Principles on discovery of preservation or collection efforts, answers separated by party represented in the Pilot Program case (excluding those who declined to answer):
  - NO EFFECT – 74% single plaintiff; 72% multiple plaintiffs; 68% single defendant; 68% multiple defendants;
  - INCREASED (to any extent) – 21% single plaintiff; 28% multiple plaintiffs; 30% single defendant; 32% multiple defendants;
  - DECREASED (to any extent) – 5% single plaintiff; 0% multiple plaintiffs; 3% single defendant; 0% multiple defendants.

17h RESPONSES BY CLIENT'S E-DISCOVERY ROLE

CLIENT'S E-DISCOVERY ROLE	RESPONSE TO QUESTION 17h		Frequency	Percent	Valid Percent	Cumulative Percent
No role selected	Valid	No Effect	1	100.0	100.0	100.0
Equally a requesting and a producing party	Valid	Increased	10	30.3	31.3	31.3
		No Effect	22	66.7	68.8	100.0
		Total	32	97.0	100.0	
	Missing	(No response)	1	3.0		
	Total		33	100.0		
Neither a requesting nor a producing party	Valid	Decreased	1	11.1	11.1	11.1
		Increased	1	11.1	11.1	22.2
		No Effect	7	77.8	77.8	100.0
		Total	9	100.0	100.0	
Primarily a producing party	Valid	Decreased	1	2.2	2.3	2.3
		Increased	12	26.1	27.9	30.2
		No Effect	30	65.2	69.8	100.0
		Total	43	93.5	100.0	
	Missing	(No response)	3	6.5		
	Total		46	100.0		
Primarily a requesting party	Valid	Greatly Decreased	1	2.3	2.4	2.4
		Greatly Increased	1	2.3	2.4	4.8
		Increased	10	22.7	23.8	28.6
		No Effect	30	68.2	71.4	100.0
		Total	42	95.5	100.0	
	Missing	(No response)	2	4.5		
	Total		44	100.0		

- Reported effect of the Principles on discovery of preservation or collection efforts, answers separated by the client's e-discovery role (excluding those who declined to answer):
  - NO EFFECT – 71% requesting party; 70% producing party; 69% equally requesting and producing; 78% neither requesting nor producing;
  - INCREASED (to any extent) – 26% requesting party; 28% producing party; 31% equally requesting and producing; 11% neither requesting nor producing;
  - DECREASED (to any extent) – 2% requesting party; 2% producing party; 0% equally requesting and producing; 11% neither requesting nor producing.

17h RESPONSES BY WHETHER THE CLIENT'S ESI CONNECTED WITH THE PILOT PROGRAM CASE PRESENTED A PARTICULAR CHALLENGE

CLIENT'S ESI IN THE CASE	RESPONSE TO QUESTION 17h		Frequency	Percent	Valid Percent	Cumulative Percent
No particularly challenging categories of ESI	Valid	Increased	4	15.4	16.7	16.7
		No Effect	20	76.9	83.3	100.0
		Total	24	92.3	100.0	
	Missing	(No response)	2	7.7		
	Total		26	100.0		
One or more of the following: high volume of data; legacy data; disaster recovery data; segregated data; automatically updated data; structured data; foreign data	Valid	Decreased	2	1.9	1.9	1.9
		Greatly Decreased	1	.9	1.0	2.9
		Greatly Increased	1	.9	1.0	3.9
		Increased	29	27.1	28.2	32.0
		No Effect	70	65.4	68.0	100.0
		Total	103	96.3	100.0	
	Missing	(No response)	4	3.7		
	Total		107	100.0		

- Reported effect of the Principles on discovery of preservation or collection efforts, answers separated by the client's ESI connected with the Pilot Program case (excluding those who declined to answer):
  - NO EFFECT – 83% no challenging ESI categories; 68% one or more challenging ESI categories;
  - INCREASED (to any extent) – 17% no challenging ESI categories; 29% one or more challenging ESI categories;
  - DECREASED (to any extent) – 0% no challenging ESI categories; 3% one or more challenging ESI categories.

Question 18a: Please assess how application of the Pilot Program Principles has affected (or likely will affect) the following, for your client: discovery costs.

18a RESPONSES BY PARTY REPRESENTED

PARTY REPRESENTED	RESPONSE TO QUESTION 18a		Frequency	Percent	Valid Percent	Cumulative Percent
No party selected	Valid	Greatly Increased	1	100.0	100.0	100.0
Multiple defendants	Valid	Decreased	7	26.9	28.0	28.0
		Increased	5	19.2	20.0	48.0
		No Effect	13	50.0	52.0	100.0
		Total	25	96.2	100.0	
	Missing	(No response)	1	3.8		
	Total		26	100.0		
Multiple plaintiffs	Valid	Decreased	5	18.5	20.8	20.8
		Increased	2	7.4	8.3	29.2
		No Effect	17	63.0	70.8	100.0
		Total	24	88.9	100.0	
	Missing	(No response)	3	11.1		
	Total		27	100.0		
Single defendant	Valid	Decreased	10	25.0	26.3	26.3
		Greatly Increased	2	5.0	5.3	31.6
		Increased	10	25.0	26.3	57.9
		No Effect	16	40.0	42.1	100.0
		Total	38	95.0	100.0	
	Missing	(No response)	2	5.0		
	Total		40	100.0		
Single plaintiff	Valid	Decreased	6	15.4	15.8	15.8
		Increased	6	15.4	15.8	31.6
		No Effect	26	66.7	68.4	100.0
		Total	38	97.4	100.0	
	Missing	(No response)	1	2.6		
	Total		39	100.0		

- Reported effect of the Principles on discovery costs, answers separated by party represented in the Pilot Program case (excluding those who declined to answer):
  - NO EFFECT – 68% single plaintiff; 71% multiple plaintiffs; 42% single defendant; 52% multiple defendants;
  - INCREASED (to any extent) – 16% single plaintiff; 8% multiple plaintiffs; 32% single defendant; 20% multiple defendants;

- DECREASED (to any extent) – 16% single plaintiff; 21% multiple plaintiffs; 26% single defendant; 28% multiple defendants.

18a RESPONSES BY CLIENT'S E-DISCOVERY ROLE

CLIENT'S E-DISCOVERY ROLE	RESPONSE TO QUESTION 18a		Frequency	Percent	Valid Percent	Cumulative Percent
No role selected	Valid	No Effect	1	100.0	100.0	100.0
Equally a requesting and a producing party	Valid	Decreased	8	24.2	25.0	25.0
		Increased	8	24.2	25.0	50.0
		No Effect	16	48.5	50.0	100.0
		Total	32	97.0	100.0	
	Missing	(No response)	1	3.0		
	Total		33	100.0		
Neither a requesting nor a producing party	Valid	Increased	3	33.3	33.3	33.3
		No Effect	6	66.7	66.7	100.0
		Total	9	100.0	100.0	
Primarily a producing party	Valid	Decreased	10	21.7	22.7	22.7
		Greatly Increased	2	4.3	4.5	27.3
		Increased	8	17.4	18.2	45.5
		No Effect	24	52.2	54.5	100.0
		Total	44	95.7	100.0	
	Missing	(No response)	2	4.3		
	Total		46	100.0		
Primarily a requesting party	Valid	Decreased	10	22.7	25.0	25.0
		Greatly Increased	1	2.3	2.5	27.5
		Increased	4	9.1	10.0	37.5
		No Effect	25	56.8	62.5	100.0
		Total	40	90.9	100.0	
	Missing	(No response)	4	9.1		
	Total		44	100.0		

- Reported effect of the Principles on discovery costs, answers separated by the client's e-discovery role (excluding those who declined to answer):
  - NO EFFECT – 63% requesting party; 55% producing party; 50% equally requesting and producing; 67% neither requesting nor producing;
  - INCREASED (to any extent) – 13% requesting party; 23% producing party; 25% equally requesting and producing; 33% neither requesting nor producing;
  - DECREASED (to any extent) – 25% requesting party; 23% producing party; 25% equally requesting and producing; 0% neither requesting nor producing.

18a RESPONSES BY WHETHER THE CLIENT'S ESI CONNECTED WITH THE PILOT PROGRAM CASE PRESENTED A PARTICULAR CHALLENGE

CLIENT'S ESI IN THE CASE	RESPONSE TO QUESTION 18a		Frequency	Percent	Valid Percent	Cumulative Percent
No particularly challenging categories of ESI	Valid	Decreased	1	3.8	4.2	4.2
		Increased	2	7.7	8.3	12.5
		No Effect	21	80.8	87.5	100.0
		Total	24	92.3	100.0	
	Missing	(No response)	2	7.7		
	Total		26	100.0		
One or more of the following: high volume of data; legacy data; disaster recovery data; segregated data; automatically updated data; structured data; foreign data	Valid	Decreased	27	25.2	26.5	26.5
		Greatly Increased	3	2.8	2.9	29.4
		Increased	21	19.6	20.6	50.0
		No Effect	51	47.7	50.0	100.0
		Total	102	95.3	100.0	
	Missing	(No response)	5	4.7		
	Total		107	100.0		

- Whether the Principles had an effect on discovery costs, responses by the client's ESI connected with the Pilot Program case (excluding those who declined to answer):
  - NO EFFECT – 88% no challenging ESI categories; 50% one or more challenging ESI categories;
  - INCREASED (to any extent) – 8% no challenging ESI categories; 24% one or more challenging ESI categories;
  - DECREASED (to any extent) – 4% no challenging ESI categories; 27% one or more challenging ESI categories.

Question 18b: Please assess how application of the Pilot Program Principles has affected (or likely will affect) the following, for your client: total litigation costs.

18b RESPONSES BY PARTY REPRESENTED

PARTY REPRESENTED	RESPONSE TO QUESTION 18b		Frequency	Percent	Valid Percent	Cumulative Percent
No party selected	Valid	Increased	1	100.0	100.0	100.0
Multiple defendants	Valid	Decreased	6	23.1	24.0	24.0
		Increased	6	23.1	24.0	48.0
		No Effect	13	50.0	52.0	100.0
		Total	25	96.2	100.0	
	Missing	(No response)	1	3.8		
	Total		26	100.0		
Multiple plaintiffs	Valid	Decreased	5	18.5	20.8	20.8
		Increased	2	7.4	8.3	29.2
		No Effect	17	63.0	70.8	100.0
		Total	24	88.9	100.0	
	Missing	(No response)	3	11.1		
	Total		27	100.0		
Single defendant	Valid	Decreased	11	27.5	28.9	28.9
		Greatly Increased	2	5.0	5.3	34.2
		Increased	9	22.5	23.7	57.9
		No Effect	16	40.0	42.1	100.0
		Total	38	95.0	100.0	
	Missing	(No response)	2	5.0		
	Total		40	100.0		
Single plaintiff	Valid	Decreased	4	10.3	10.3	10.3
		Increased	7	17.9	17.9	28.2
		No Effect	28	71.8	71.8	100.0
		Total	39	100.0	100.0	

- Reported effect of the Principles on total litigation costs, answers separated by party represented in the Pilot Program case (excluding those who declined to answer):
  - NO EFFECT – 72% single plaintiff; 71% multiple plaintiffs; 42% single defendant; 52% multiple defendants;
  - INCREASED (to any extent) – 18% single plaintiff; 8% multiple plaintiffs; 29% single defendant; 24% multiple defendants;
  - DECREASED (to any extent) – 10% single plaintiff; 21% multiple plaintiffs; 29% single defendant; 24% multiple defendants.

18b RESPONSES BY CLIENT'S E-DISCOVERY ROLE

CLIENT'S E-DISCOVERY ROLE	RESPONSE TO QUESTION 18b		Frequency	Percent	Valid Percent	Cumulative Percent
No role selected	Valid	No Effect	1	100.0	100.0	100.0
Equally a requesting and a producing party	Valid	Decreased	8	24.2	25.0	25.0
		Increased	7	21.2	21.9	46.9
		No Effect	17	51.5	53.1	100.0
		Total	32	97.0	100.0	
	Missing	(No response)	1	3.0		
	Total		33	100.0		
Neither a requesting nor a producing party	Valid	Decreased	1	11.1	11.1	11.1
		Increased	3	33.3	33.3	44.4
		No Effect	5	55.6	55.6	100.0
		Total	9	100.0	100.0	
Primarily a producing party	Valid	Decreased	9	19.6	20.5	20.5
		Greatly Increased	1	2.2	2.3	22.7
		Increased	10	21.7	22.7	45.5
		No Effect	24	52.2	54.5	100.0
		Total	44	95.7	100.0	
	Missing	(No response)	2	4.3		
	Total		46	100.0		
Primarily a requesting party	Valid	Decreased	8	18.2	19.5	19.5
		Greatly Increased	1	2.3	2.4	22.0
		Increased	5	11.4	12.2	34.1
		No Effect	27	61.4	65.9	100.0
		Total	41	93.2	100.0	
	Missing	(No response)	3	6.8		
	Total		44	100.0		

- Reported effect of the Principles on total litigation costs, answers separated by the client's e-discovery role (excluding those who declined to answer):
  - NO EFFECT – 66% requesting party; 55% producing party; 53% equally requesting and producing; 56% neither requesting nor producing;
  - INCREASED (to any extent) – 15% requesting party; 25% producing party; 22% equally requesting and producing; 33% neither requesting nor producing;
  - DECREASED (to any extent) – 20% requesting party; 21% producing party; 25% equally requesting and producing; 11% neither requesting nor producing.

18b RESPONSES BY WHETHER THE CLIENT'S ESI CONNECTED WITH THE PILOT PROGRAM CASE PRESENTED A PARTICULAR CHALLENGE

CLIENT'S ESI IN THE CASE	RESPONSE TO QUESTION 18b		Frequency	Percent	Valid Percent	Cumulative Percent
No particularly challenging categories of ESI	Valid	Decreased	1	3.8	4.2	4.2
		Increased	2	7.7	8.3	12.5
		No Effect	21	80.8	87.5	100.0
		Total	24	92.3	100.0	
	Missing	(No response)	2	7.7		
	Total		26	100.0		
One or more of the following: high volume of data; legacy data; disaster recovery data; segregated data; automatically updated data; structured data; foreign data	Valid	Decreased	25	23.4	24.3	24.3
		Greatly Increased	2	1.9	1.9	26.2
		Increased	23	21.5	22.3	48.5
		No Effect	53	49.5	51.5	100.0
		Total	103	96.3	100.0	
	Missing	(No response)	4	3.7		
	Total		107	100.0		

- Reported effect of the Principles on total litigation costs, answers separated by the client's ESI connected with the Pilot Program case (excluding those who declined to answer):
  - NO EFFECT – 8% no challenging ESI categories; 52% one or more challenging ESI categories;
  - INCREASED (to any extent) – 8% no challenging ESI categories; 24% one or more challenging ESI categories;
  - DECREASED (to any extent) – 4% no challenging ESI categories; 24% one or more challenging ESI categories.

Question 18c: Please assess how application of the Pilot Program Principles has affected (or likely will affect) the following, for your client: length of the discovery period.

18c RESPONSES BY PARTY REPRESENTED

PARTY REPRESENTED	RESPONSE TO QUESTION 18c		Frequency	Percent	Valid Percent	Cumulative Percent
No party selected	Valid	No Effect	1	100.0	100.0	100.0
Multiple defendants	Valid	Decreased	4	15.4	16.0	16.0
		Increased	4	15.4	16.0	32.0
		No Effect	17	65.4	68.0	100.0
		Total	25	96.2	100.0	
	Missing	(No response)	1	3.8		
	Total		26	100.0		
Multiple plaintiffs	Valid	Decreased	2	7.4	8.3	8.3
		Greatly Decreased	1	3.7	4.2	12.5
		Increased	1	3.7	4.2	16.7
		No Effect	20	74.1	83.3	100.0
		Total	24	88.9	100.0	
	Missing	(No response)	3	11.1		
	Total		27	100.0		
Single defendant	Valid	Decreased	3	7.5	7.9	7.9
		Greatly Increased	1	2.5	2.6	10.5
		Increased	6	15.0	15.8	26.3
		No Effect	28	70.0	73.7	100.0
		Total	38	95.0	100.0	
	Missing	(No response)	2	5.0		
	Total		40	100.0		
Single plaintiff	Valid	Decreased	3	7.7	7.7	7.7
		Greatly Increased	1	2.6	2.6	10.3
		Increased	4	10.3	10.3	20.5
		No Effect	31	79.5	79.5	100.0
		Total	39	100.0	100.0	

- Reported effect of the Principles on the length of the discovery period, answers separated by party represented in the Pilot Program case (excluding those who declined to answer):
  - NO EFFECT – 80% single plaintiff; 83% multiple plaintiffs; 74% single defendant; 68% multiple defendants;

- INCREASED (to any extent) – 13% single plaintiff; 4% multiple plaintiffs; 18% single defendant; 16% multiple defendants;
- DECREASED (to any extent) – 8% single plaintiff; 13% multiple plaintiffs; 8% single defendant; 16% multiple defendants.

18c RESPONSES BY CLIENT'S E-DISCOVERY ROLE

CLIENT'S E-DISCOVERY ROLE	RESPONSE TO QUESTION 18c		Frequency	Percent	Valid Percent	Cumulative Percent
No role selected	Valid	No Effect	1	100.0	100.0	100.0
Equally a requesting and a producing party	Valid	Decreased	3	9.1	9.4	9.4
		Increased	3	9.1	9.4	18.8
		No Effect	26	78.8	81.3	100.0
		Total	32	97.0	100.0	
	Missing	(No response)	1	3.0		
	Total		33	100.0		
Neither a requesting nor a producing party	Valid	Decreased	1	11.1	11.1	11.1
		Increased	3	33.3	33.3	44.4
		No Effect	5	55.6	55.6	100.0
		Total	9	100.0	100.0	
Primarily a producing party	Valid	Decreased	5	10.9	11.4	11.4
		Greatly Increased	1	2.2	2.3	13.6
		Increased	5	10.9	11.4	25.0
		No Effect	33	71.7	75.0	100.0
		Total	44	95.7	100.0	
	Missing	(No response)	2	4.3		
	Total		46	100.0		
Primarily a requesting party	Valid	Decreased	3	6.8	7.3	7.3
		Greatly Decreased	1	2.3	2.4	9.8
		Greatly Increased	1	2.3	2.4	12.2
		Increased	4	9.1	9.8	22.0
		No Effect	32	72.7	78.0	100.0
		Total	41	93.2	100.0	
	Missing	(No response)	3	6.8		
	Total		44	100.0		

- Reported effect of the Principles on the length of the discovery period, answers separated by the client's e-discovery role (excluding those who declined to answer):
  - NO EFFECT – 78% requesting party; 75% producing party; 81% equally requesting and producing; 56% neither requesting nor producing;
  - INCREASED (to any extent) – 12% requesting party; 14% producing party; 9% equally requesting and producing; 33% neither requesting nor producing;
  - DECREASED (to any extent) – 10% requesting party; 11% producing party; 9% equally requesting and producing; 11% neither requesting nor producing.

18c RESPONSES BY WHETHER THE CLIENT'S ESI CONNECTED WITH THE PILOT PROGRAM CASE PRESENTED A PARTICULAR CHALLENGE

CLIENT'S ESI IN THE CASE	RESPONSE TO QUESTION 18c		Frequency	Percent	Valid Percent	Cumulative Percent
No particularly challenging categories of ESI	Valid	Increased	2	7.7	8.3	8.3
		No Effect	22	84.6	91.7	100.0
		Total	24	92.3	100.0	
	Missing	(No response)	2	7.7		
	Total		26	100.0		
One or more of the following: high volume of data; legacy data; disaster recovery data; segregated data; automatically updated data; structured data; foreign data	Valid	Decreased	12	11.2	11.7	11.7
		Greatly Decreased	1	.9	1.0	12.6
		Greatly Increased	2	1.9	1.9	14.6
		Increased	13	12.1	12.6	27.2
		No Effect	75	70.1	72.8	100.0
		Total	103	96.3	100.0	
	Missing	(No response)	4	3.7		
	Total		107	100.0		

- Reported effect of the Principles on the length of the discovery period, answers separated by the client's ESI connected with the Pilot Program case (excluding those who declined to answer):
  - NO EFFECT – 92% no challenging ESI categories; 73% one or more challenging ESI categories;
  - INCREASED (to any extent) – 8% no challenging ESI categories; 15% one or more challenging ESI categories;
  - DECREASED (to any extent) – 0% no challenging ESI categories; 13% one or more challenging ESI categories.

Question 18d: Please assess how application of the Pilot Program Principles has affected (or likely will affect) the following, for your client: length of the litigation.

18d RESPONSES BY PARTY REPRESENTED

PARTY REPRESENTED	RESPONSE TO QUESTION 18d		Frequency	Percent	Valid Percent	Cumulative Percent
No party selected	Valid	No Effect	1	100.0	100.0	100.0
Multiple defendants	Valid	Decreased	3	11.5	12.0	12.0
		Greatly Increased	1	3.8	4.0	16.0
		Increased	4	15.4	16.0	32.0
		No Effect	17	65.4	68.0	100.0
		Total	25	96.2	100.0	
	Missing	(No response)	1	3.8		
	Total		26	100.0		
Multiple plaintiffs	Valid	Decreased	4	14.8	16.0	16.0
		Increased	1	3.7	4.0	20.0
		No Effect	20	74.1	80.0	100.0
		Total	25	92.6	100.0	
	Missing	(No response)	2	7.4		
	Total		27	100.0		
Single defendant	Valid	Decreased	3	7.5	7.9	7.9
		Greatly Increased	1	2.5	2.6	10.5
		Increased	5	12.5	13.2	23.7
		No Effect	29	72.5	76.3	100.0
		Total	38	95.0	100.0	
	Missing	(No response)	2	5.0		
	Total		40	100.0		
Single plaintiff	Valid	Decreased	3	7.7	7.9	7.9
		Increased	5	12.8	13.2	21.1
		No Effect	30	76.9	78.9	100.0
		Total	38	97.4	100.0	
	Missing	(No response)	1	2.6		
	Total		39	100.0		

- Reported effect of the Principles on the length of the litigation, answers separated by party represented in the Pilot Program case (excluding those who declined to answer):
  - NO EFFECT – 79% single plaintiff; 80% multiple plaintiffs; 76% single defendant; 68% multiple defendants;

- INCREASED (to any extent) – 13% single plaintiff; 4% multiple plaintiffs; 16% single defendant; 20% multiple defendants;
- DECREASED (to any extent) – 8% single plaintiff; 16% multiple plaintiffs; 8% single defendant; 12% multiple defendants.

18d RESPONSES BY CLIENT'S E-DISCOVERY ROLE

CLIENT'S E-DISCOVERY ROLE	RESPONSE TO QUESTION 18d		Frequency	Percent	Valid Percent	Cumulative Percent
No role selected	Valid	No Effect	1	100.0	100.0	100.0
Equally a requesting and a producing party	Valid	Decreased	4	12.1	12.5	12.5
		Greatly Increased	1	3.0	3.1	15.6
		Increased	2	6.1	6.3	21.9
		No Effect	25	75.8	78.1	100.0
		Total	32	97.0	100.0	
	Missing	(No response)	1	3.0		
	Total		33	100.0		
Neither a requesting nor a producing party	Valid	Decreased	1	11.1	11.1	11.1
		Increased	3	33.3	33.3	44.4
		No Effect	5	55.6	55.6	100.0
		Total	9	100.0	100.0	
Primarily a producing party	Valid	Decreased	4	8.7	9.1	9.1
		Greatly Increased	1	2.2	2.3	11.4
		Increased	5	10.9	11.4	22.7
		No Effect	34	73.9	77.3	100.0
		Total	44	95.7	100.0	
	Missing	(No response)	2	4.3		
	Total		46	100.0		
Primarily a requesting party	Valid	Decreased	4	9.1	9.8	9.8
		Increased	5	11.4	12.2	22.0
		No Effect	32	72.7	78.0	100.0
		Total	41	93.2	100.0	
	Missing	(No response)	3	6.8		
	Total		44	100.0		

- Reported effect of the Principles on the length of the litigation, answers separated by the client's e-discovery role (excluding those who declined to answer):
  - NO EFFECT – 78% requesting party; 77% producing party; 78% equally requesting and producing; 56% neither requesting nor producing;
  - INCREASED (to any extent) – 12% requesting party; 14% producing party; 9% equally requesting and producing; 33% neither requesting nor producing;

- DECREASED (to any extent) – 10% requesting party; 9% producing party; 13% equally requesting and producing; 11% neither requesting nor producing.

18d RESPONSES BY WHETHER THE CLIENT'S ESI CONNECTED WITH THE PILOT PROGRAM CASE PRESENTED A PARTICULAR CHALLENGE

CLIENT'S ESI IN THE CASE	RESPONSE TO QUESTION 18d		Frequency	Percent	Valid Percent	Cumulative Percent
No particularly challenging categories of ESI	Valid	Increased	2	7.7	8.0	8.0
		No Effect	23	88.5	92.0	100.0
		Total	25	96.2	100.0	
	Missing	(No response)	1	3.8		
	Total		26	100.0		
One or more of the following: high volume of data; legacy data; disaster recovery data; segregated data; automatically updated data; structured data; foreign data	Valid	Decreased	13	12.1	12.7	12.7
		Greatly Increased	2	1.9	2.0	14.7
		Increased	13	12.1	12.7	27.5
		No Effect	74	69.2	72.5	100.0
		Total	102	95.3	100.0	
	Missing	(No response)	5	4.7		
	Total		107	100.0		

- Reported effect of the Principles on the length of the litigation, answers separated by the client's ESI connected with the Pilot Program case (excluding those who declined to answer):
  - NO EFFECT – 92% no challenging ESI categories; 73% one or more challenging ESI categories;
  - INCREASED (to any extent) – 8% no challenging ESI categories; 15% one or more challenging ESI categories;
  - DECREASED (to any extent) – 0% no challenging ESI categories; 13% one or more challenging ESI categories.

Question 18e: Please assess how application of the Pilot Program Principles has affected (or likely will affect) the following, for your client: number of discovery disputes.

18e RESPONSES BY PARTY REPRESENTED

PARTY REPRESENTED	RESPONSE TO QUESTION 18e		Frequency	Percent	Valid Percent	Cumulative Percent
No party selected	Valid	Greatly Increased	1	100.0	100.0	100.0
Multiple defendants	Valid	Decreased	6	23.1	24.0	24.0
		Greatly Decreased	1	3.8	4.0	28.0
		Increased	5	19.2	20.0	48.0
		No Effect	13	50.0	52.0	100.0
		Total	25	96.2	100.0	
	Missing	(No response)	1	3.8		
	Total		26	100.0		
Multiple plaintiffs	Valid	Decreased	5	18.5	20.0	20.0
		Greatly Decreased	1	3.7	4.0	24.0
		Increased	2	7.4	8.0	32.0
		No Effect	17	63.0	68.0	100.0
		Total	25	92.6	100.0	
	Missing	(No response)	2	7.4		
	Total		27	100.0		
Single defendant	Valid	Decreased	8	20.0	21.1	21.1
		Greatly Increased	1	2.5	2.6	23.7
		Increased	5	12.5	13.2	36.8
		No Effect	24	60.0	63.2	100.0
		Total	38	95.0	100.0	
	Missing	(No response)	2	5.0		
	Total		40	100.0		
Single plaintiff	Valid	Decreased	4	10.3	10.3	10.3
		Increased	5	12.8	12.8	23.1
		No Effect	30	76.9	76.9	100.0
		Total	39	100.0	100.0	

- Reported effect of the Principles on the number of discovery disputes, answers separated by party represented in the Pilot Program case (excluding those who declined to answer):
  - NO EFFECT – 77% single plaintiff; 68% multiple plaintiffs; 63% single defendant; 52% multiple defendants;

- INCREASED (to any extent) – 13% single plaintiff; 8% multiple plaintiffs; 16% single defendant; 20% multiple defendants;
- DECREASED (to any extent) – 10% single plaintiff; 24% multiple plaintiffs; 21% single defendant; 28% multiple defendants.

18e RESPONSES BY CLIENT'S E-DISCOVERY ROLE

CLIENT'S E-DISCOVERY ROLE	RESPONSE TO QUESTION 18e		Frequency	Percent	Valid Percent	Cumulative Percent
No role selected	Valid	No Effect	1	100.0	100.0	100.0
Equally a requesting and a producing party	Valid	Decreased	6	18.2	18.8	18.8
		Increased	4	12.1	12.5	31.3
		No Effect	22	66.7	68.8	100.0
		Total	32	97.0	100.0	
	Missing	(No response)	1	3.0		
	Total		33	100.0		
Neither a requesting nor a producing party	Valid	Decreased	1	11.1	11.1	11.1
		Increased	2	22.2	22.2	33.3
		No Effect	6	66.7	66.7	100.0
		Total	9	100.0	100.0	
Primarily a producing party	Valid	Decreased	11	23.9	25.0	25.0
		Greatly Decreased	1	2.2	2.3	27.3
		Greatly Increased	2	4.3	4.5	31.8
		Increased	6	13.0	13.6	45.5
		No Effect	24	52.2	54.5	100.0
		Total	44	95.7	100.0	
	Missing	(No response)	2	4.3		
	Total		46	100.0		
Primarily a requesting party	Valid	Decreased	5	11.4	11.9	11.9
		Greatly Decreased	1	2.3	2.4	14.3
		Increased	5	11.4	11.9	26.2
		No Effect	31	70.5	73.8	100.0
		Total	42	95.5	100.0	
	Missing	(No response)	2	4.5		
	Total		44	100.0		

- Reported effect of the Principles on the number of discovery disputes, answers separated by the client's e-discovery role (excluding those who declined to answer):
  - NO EFFECT – 74% requesting party; 55% producing party; 69% equally requesting and producing; 67% neither requesting nor producing;
  - INCREASED (to any extent) – 12% requesting party; 18% producing party; 13% equally requesting and producing; 22% neither requesting nor producing;
  - DECREASED (to any extent) – 14% requesting party; 27% producing party; 19% equally requesting and producing; 11% neither requesting nor producing.

18e RESPONSES BY WHETHER THE CLIENT'S ESI CONNECTED WITH THE PILOT PROGRAM CASE PRESENTED A PARTICULAR CHALLENGE

CLIENT'S ESI IN THE CASE	RESPONSE TO QUESTION 18e		Frequency	Percent	Valid Percent	Cumulative Percent
No particularly challenging categories of ESI	Valid	Decreased	1	3.8	4.0	4.0
		Increased	2	7.7	8.0	12.0
		No Effect	22	84.6	88.0	100.0
		Total	25	96.2	100.0	
	Missing	(No response)	1	3.8		
	Total		26	100.0		
One or more of the following: high volume of data; legacy data; disaster recovery data; segregated data; automatically updated data; structured data; foreign data	Valid	Decreased	22	20.6	21.4	21.4
		Greatly Decreased	2	1.9	1.9	23.3
		Greatly Increased	2	1.9	1.9	25.2
		Increased	15	14.0	14.6	39.8
		No Effect	62	57.9	60.2	100.0
		Total	103	96.3	100.0	
	Missing	(No response)	4	3.7		
	Total		107	100.0		

- Reported effect of the Principles on the number of discovery disputes, answers separated by the client's ESI connected with the Pilot Program case (excluding those who declined to answer):
  - NO EFFECT – 88% no challenging ESI categories; 60% one or more challenging ESI categories;
  - INCREASED (to any extent) – 8% no challenging ESI categories; 17% one or more challenging ESI categories;
  - DECREASED (to any extent) – 4% no challenging ESI categories; 23% one or more challenging ESI categories.

Question 20a: Please indicate your level of agreement with the following statement: The involvement of my client's e-discovery liaison has contributed to a more efficient discovery process.

20a RESPONSES BY PARTY REPRESENTED

PARTY REPRESENTED	RESPONSE TO QUESTION 20a		Frequency	Percent	Valid Percent	Cumulative Percent
No party selected	Valid	Not Applicable	1	100.0	100.0	100.0
Multiple defendants	Valid	Agree	11	42.3	42.3	42.3
		Disagree	1	3.8	3.8	46.2
		Not Applicable	12	46.2	46.2	92.3
		Strongly Agree	2	7.7	7.7	100.0
		Total	26	100.0	100.0	
Multiple plaintiffs	Valid	Agree	12	44.4	46.2	46.2
		Disagree	1	3.7	3.8	50.0
		Not Applicable	10	37.0	38.5	88.5
		Strongly Agree	3	11.1	11.5	100.0
		Total	26	96.3	100.0	
	Missing	(No response)	1	3.7		
	Total		27	100.0		
Single defendant	Valid	Agree	14	35.0	35.0	35.0
		Disagree	2	5.0	5.0	40.0
		Not Applicable	19	47.5	47.5	87.5
		Strongly Agree	5	12.5	12.5	100.0
		Total	40	100.0	100.0	
Single plaintiff	Valid	Agree	15	38.5	38.5	38.5
		Disagree	4	10.3	10.3	48.7
		Not Applicable	19	48.7	48.7	97.4
		Strongly Agree	1	2.6	2.6	100.0
		Total	39	100.0	100.0	

- Reaction to the statement that the client's e-discovery liaison contributed to a more efficient discovery process, separated by party represented in the Pilot Program case (excluding those who declined to answer):
  - AGREED (to any extent) – 41% single plaintiff; 58% multiple plaintiffs; 48% single defendant; 50% multiple defendants;
  - DISAGREED (to any extent) – 10% single plaintiff; 4% multiple plaintiffs; 5% single defendant; 4% multiple defendants;
  - NOT APPLICABLE – 49% single plaintiff; 39% multiple plaintiffs; 48% single defendant; 46% multiple defendants.

20a RESPONSES BY CLIENT'S E-DISCOVERY ROLE

CLIENT'S E-DISCOVERY ROLE	RESPONSE TO QUESTION 20a		Frequency	Percent	Valid Percent	Cumulative Percent
No role selected	Valid	Not Applicable	1	100.0	100.0	100.0
Equally a requesting and a producing party	Valid	Agree	14	42.4	42.4	42.4
		Disagree	3	9.1	9.1	51.5
		Not Applicable	14	42.4	42.4	93.9
		Strongly Agree	2	6.1	6.1	100.0
		Total	33	100.0	100.0	
Neither a requesting nor a producing party	Valid	Agree	2	22.2	22.2	22.2
		Not Applicable	7	77.8	77.8	100.0
		Total	9	100.0	100.0	
Primarily a producing party	Valid	Agree	20	43.5	43.5	43.5
		Disagree	2	4.3	4.3	47.8
		Not Applicable	18	39.1	39.1	87.0
		Strongly Agree	6	13.0	13.0	100.0
		Total	46	100.0	100.0	
Primarily a requesting party	Valid	Agree	16	36.4	37.2	37.2
		Disagree	3	6.8	7.0	44.2
		Not Applicable	21	47.7	48.8	93.0
		Strongly Agree	3	6.8	7.0	100.0
		Total	43	97.7	100.0	
	Missing	(No response)	1	2.3		
	Total		44	100.0		

- Reaction to the statement that the client's e-discovery liaison contributed to a more efficient discovery process, separated by the client's e-discovery role (excluding those who declined to answer):
  - AGREED (to any extent) – 44% requesting party; 57% producing party; 49% equally requesting and producing; 22% neither requesting nor producing;
  - DISAGREED (to any extent) – 7% requesting party; 4% producing party; 9% equally requesting and producing; 0% neither requesting nor producing;
  - NOT APPLICABLE – 49% requesting party; 39% producing party; 42% equally requesting and producing; 78% neither requesting nor producing.

20a RESPONSES BY WHETHER THE CLIENT'S ESI CONNECTED WITH THE PILOT PROGRAM CASE PRESENTED A PARTICULAR CHALLENGE

CLIENT'S ESI IN THE CASE	RESPONSE TO QUESTION 20a		Frequency	Percent	Valid Percent	Cumulative Percent
No particularly challenging categories of ESI	Valid	Agree	7	26.9	28.0	28.0
		Disagree	2	7.7	8.0	36.0
		Not Applicable	15	57.7	60.0	96.0
		Strongly Agree	1	3.8	4.0	100.0
		Total	25	96.2	100.0	
	Missing	(No response)	1	3.8		
	Total		26	100.0		
One or more of the following: high volume of data; legacy data; disaster recovery data; segregated data; automatically updated data; structured data; foreign data	Valid	Agree	45	42.1	42.1	42.1
		Disagree	6	5.6	5.6	47.7
		Not Applicable	46	43.0	43.0	90.7
		Strongly Agree	10	9.3	9.3	100.0
		Total	107	100.0	100.0	

- Reaction to the statement that the client's e-discovery liaison contributed to a more efficient discovery process, separated by the client's ESI connected with the Pilot Program case (excluding those who declined to answer):
  - AGREED (to any extent) – 32% no challenging ESI categories; 51% one or more challenging ESI categories;
  - DISAGREED (to any extent) – 8% no challenging ESI categories; 6% one or more challenging ESI categories;
  - NOT APPLICABLE – 60% no challenging ESI categories; 43% one or more challenging ESI categories.

Question 20b: Please indicate your level of agreement with the following statement: The involvement of the e-discovery liaison for the other party/parties has contributed to a more efficient e-discovery process.

20b RESPONSES BY PARTY REPRESENTED

PARTY REPRESENTED	RESPONSE TO QUESTION 20b		Frequency	Percent	Valid Percent	Cumulative Percent
No party selected	Valid	Not Applicable	1	100.0	100.0	100.0
Multiple defendants	Valid	Agree	7	26.9	26.9	26.9
		Disagree	1	3.8	3.8	30.8
		Not Applicable	17	65.4	65.4	96.2
		Strongly Agree	1	3.8	3.8	100.0
		Total	26	100.0	100.0	
Multiple plaintiffs	Valid	Agree	8	29.6	33.3	33.3
		Disagree	2	7.4	8.3	41.7
		Not Applicable	13	48.1	54.2	95.8
		Strongly Agree	1	3.7	4.2	100.0
		Total	24	88.9	100.0	
	Missing	(No response)	3	11.1		
	Total		27	100.0		
Single defendant	Valid	Agree	8	20.0	20.0	20.0
		Disagree	4	10.0	10.0	30.0
		Not Applicable	27	67.5	67.5	97.5
		Strongly Agree	1	2.5	2.5	100.0
		Total	40	100.0	100.0	
Single plaintiff	Valid	Agree	4	10.3	10.3	10.3
		Disagree	3	7.7	7.7	17.9
		Not Applicable	31	79.5	79.5	97.4
		Strongly Disagree	1	2.6	2.6	100.0
		Total	39	100.0	100.0	

- Reaction to the statement that the e-discovery liaison for the other party/parties contributed to a more efficient discovery process, separated by party represented in the Pilot Program case (excluding those who declined to answer):
  - AGREED (to any extent) – 10% single plaintiff; 38% multiple plaintiffs; 23% single defendant; 31% multiple defendants;
  - DISAGREED (to any extent) – 10% single plaintiff; 8% multiple plaintiffs; 10% single defendant; 4% multiple defendants;
  - NOT APPLICABLE – 80% single plaintiff; 54% multiple plaintiffs; 68% single defendant; 65% multiple defendants.

20b RESPONSES BY CLIENT'S E-DISCOVERY ROLE

CLIENT'S E-DISCOVERY ROLE	RESPONSE TO QUESTION 20b		Frequency	Percent	Valid Percent	Cumulative Percent
No role selected	Valid	Not Applicable	1	100.0	100.0	100.0
Equally a requesting and a producing party	Valid	Agree	8	24.2	24.2	24.2
		Disagree	4	12.1	12.1	36.4
		Not Applicable	21	63.6	63.6	100.0
		Total	33	100.0	100.0	
Neither a requesting nor a producing party	Valid	Agree	2	22.2	22.2	22.2
		Not Applicable	7	77.8	77.8	100.0
		Total	9	100.0	100.0	
Primarily a producing party	Valid	Agree	7	15.2	15.2	15.2
		Disagree	1	2.2	2.2	17.4
		Not Applicable	36	78.3	78.3	95.7
		Strongly Agree	2	4.3	4.3	100.0
		Total	46	100.0	100.0	
Primarily a requesting party	Valid	Agree	10	22.7	24.4	24.4
		Disagree	5	11.4	12.2	36.6
		Not Applicable	24	54.5	58.5	95.1
		Strongly Agree	1	2.3	2.4	97.6
		Strongly Disagree	1	2.3	2.4	100.0
		Total	41	93.2	100.0	
	Missing	(No response)	3	6.8		
	Total		44	100.0		

- Reaction to the statement that the e-discovery liaison for the other party/parties contributed to a more efficient discovery process, separated by the client's e-discovery role (excluding those who declined to answer):
  - AGREED (to any extent) – 27% requesting party; 20% producing party; 24% equally requesting and producing; 22% neither requesting nor producing;
  - DISAGREED (to any extent) – 15% requesting party; 2% producing party; 12% equally requesting and producing; 0% neither requesting nor producing;
  - NOT APPLICABLE – 59% requesting party; 78% producing party; 64% equally requesting and producing; 78% neither requesting nor producing.

20b RESPONSES BY WHETHER THE CLIENT'S ESI CONNECTED WITH THE PILOT PROGRAM CASE PRESENTED A PARTICULAR CHALLENGE

CLIENT'S ESI IN THE CASE	RESPONSE TO QUESTION 20b		Frequency	Percent	Valid Percent	Cumulative Percent
No particularly challenging categories of ESI	Valid	Agree	2	7.7	8.3	8.3
		Disagree	2	7.7	8.3	16.7
		Not Applicable	20	76.9	83.3	100.0
		Total	24	92.3	100.0	
	Missing	(No response)	2	7.7		
	Total		26	100.0		
One or more of the following: high volume of data; legacy data; disaster recovery data; segregated data; automatically updated data; structured data; foreign data	Valid	Agree	25	23.4	23.6	23.6
		Disagree	8	7.5	7.5	31.1
		Not Applicable	69	64.5	65.1	96.2
		Strongly Agree	3	2.8	2.8	99.1
		Strongly Disagree	1	.9	.9	100.0
		Total	106	99.1	100.0	
	Missing	(No response)	1	.9		
	Total		107	100.0		

- Reaction to the statement that the e-discovery liaison for the other party/parties contributed to a more efficient discovery process, separated by the client's ESI connected with the Pilot Program case (excluding those who declined to answer):
  - AGREED (to any extent) – 8% no challenging ESI categories; 26% one or more challenging ESI categories;
  - DISAGREED (to any extent) – 8% no challenging ESI categories; 8% one or more challenging ESI categories;
  - NOT APPLICABLE – 83% no challenging ESI categories; 65% one or more challenging ESI categories.

F.2. Phase Two

F.2.a. Judge and Attorneys Surveys

Federal Judicial Center
Research Division (202) 502-4078

MEMORANDUM

DATE: March 19, 2012

TO: Chief District Judge James Holderman, Northern District of Illinois

FROM: Jason A. Cantone & Emery G. Lee III, Federal Judicial Center

SUBJECT: E-Discovery Pilot Survey Results, Judge and Attorney Surveys

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This Memorandum summarizes the findings of the judge and attorney surveys conducted in February–March of 2012 as part of Phase II of the Seventh Circuit E-Discovery Pilot Program. The findings of the e-filer survey are summarized in a separate memorandum.

The judge survey was sent to 40 judges; 27 replied, for a response rate of 68%. The attorney survey was sent to 787 attorneys designated as lead counsel in cases identified as pilot cases; 234 replied, for a response rate of 30%.

After an executive summary, the Memorandum provides descriptive tables—22 for the judge survey and 35 for the attorney survey. The descriptive tables list the percentage of survey respondents providing answer options and the total number of survey respondents for each question for both the Phase I and Phase II surveys. (To calculate the raw number of respondents giving each answer, multiply the percentage by the *N* at the bottom of the column.) This format was selected to enable quick comparison of the responses to the Phase I and Phase II surveys. The executive summary, however, will focus on the Phase II results.

Executive Summary: Judge Survey

The median judge respondent reported 6–10 e-discovery cases in the past 5 years, not including pilot cases. Fully 42% of judge respondents reported at least 11 e-discovery cases, not including pilot cases, in the past 5 years (Table J-1).

Judge respondents reported relatively high levels of familiarity with the Principles, with 77% rating themselves as a 4 or 5 (“Very familiar”) on the 0–5 scale. No judge rated herself as “Not at all familiar” (Table J-2).

Judge respondents tended to rate parties’ discussions of e-discovery issues prior to the Rule 16(b) conference as comprehensive, with 78% rating the discussions in the upper half of the 0–5 scale (5 being “Comprehensive Discussion”) (Table J-5).

Fully 63% of judge respondents reported that the Rule 26(b)(2)(C) proportionality standards play a significant role in the development of discovery plans in their pilot cases (Table J-4).

In terms of the effects of the application of the Principles in their pilot cases, judge respondents rated the following the most positively:

- 84% of responding judges reported that application of the Principles had increased or greatly increased counsel's familiarity with their clients' data and systems (Table J-19);
- 78% that the Principles had increased or greatly increased levels of cooperation exhibited by counsel to efficiently resolve their cases (Table J-5);
- 78% that the Principles had increased or greatly increased the likelihood of a FRE 502 agreement in their Pilot cases (Table J-6);
- 75% that the Principles had increased or greatly increased the fairness of the e-discovery process (Table J-16);
- 71% that the Principles had increased or greatly increased counsels' demonstrated level of attention to the technologies affecting the discovery process (Table J-17);
- 70% that the Principles had increased their own understanding of the parties' data and systems (Table J-20);
- 67% that the Principles had increased or greatly increased the extent to which counsel meaningfully attempt to resolve discovery disputes before seeking court intervention (Table J-7);
- 66% that the Principles had increased or greatly increased the parties' ability to obtain relevant documents (Table J-9);
- 59% that the Principles had increased or greatly increased their own level of attention to the technologies affecting the discovery process (Table J-18);
- 52% that the Principles had increased or greatly increased the promptness with which unresolved discovery disputes are brought to the court's attention (Table J-8);and
- 48% that the Principles had decreased or greatly decreased the number of discovery disputes brought before the court (Table J-13).

In terms of the effects of application of the Principles in their Pilot cases, judge respondents rated the following the least positively:

- 73% of responding judges reported that application of the Principles had no effect on counsels' ability to zealously represent the litigants (Table J-15);
- 70% that the Principles had no effect on the length of the litigation (Table J-12);
- 63% that the Principles had no effect on the length of the discovery period (Table J-11);
- 48% that the Principles had no effect on the number of allegations of spoliation or sanctionable conduct regarding the preservation or collection of ESI (Table 10); and
- 44% that the Principles had no effect on the number of requests for discovery of another party's efforts to preserve or collect ESI (Table J-14).

Fully 63% of judge respondents agreed or strongly agreed with the statement that "The involvement of e-discovery liaison(s) has contributed to a more efficient discovery process," and no judge respondent disagreed or strongly disagreed with that statement (Table J-21). And 68% of judge respondents reported that the Principles work better in some cases than in others (Table J-22).

Executive Summary: Attorney Survey

The mean number of years in practice was 21 years. The most common practice area for attorney respondents was commercial litigation—not primarily class action. The median attorney reported 6–10 e-discovery cases in the past 5 years, not including Pilot cases. Fully 37% of attorneys rated their own familiarity with the Principles at 4 or 5 ("Very familiar") on the 0–5 scale; the median attorney rated herself at 3 on the 0–5 scale. The most common party type in the attorney respondents' Pilot cases was a privately held company, 43%.

One point to keep in mind in interpreting these results: 62% of attorney respondents reported having represented a defendant in their Pilot case. In the Phase I survey, the respondents were split evenly between plaintiff and defendant attorneys. Given the relative imbalance between plaintiff and defendant attorneys, it makes sense the most commonly reported role with respect to ESI was primarily a producing party, reported by 38% (Table A-5).

As for the percentage of the information exchanged between the parties in electronic format, attorney responses were bimodal, with 41% reporting less than one quarter of the information exchanged was in electronic format and 29% more than three quarters (Table A-3).

Only 23% of attorney respondents reported that any requesting party in their Pilot case would bear a material portion of the production costs of ESI.

In terms of challenging types of ESI, the most commonly reported was high volume data of 100–500 gigabytes and up to 25 custodians, reported by 41% of attorney respondents, followed by segregated data, 22%, structured data, 22%, and legacy data, 19% (Table A-6). Interestingly, no attorney respondent in Phase II reported foreign data.

Fully 49% of attorney respondents reported meeting with opposing counsel at the case's outset to discuss preservation of ESI (Table A-7), 63% reported that, prior to meeting with opposing counsel, they became familiar with their client's electronic data and systems (Table A-8), and 46% reported that, at or soon after the Rule 26(f) meeting, the parties discussed potential methods for identifying ESI for production (Table A-9).

Fully 41% of attorney respondents reported that they met with opposing counsel, prior to the Rule 16(b) conference, to discuss the discovery process and ESI (Table 10). Only 10% reported that unresolved e-discovery disputes were presented to the court at the Rule 16(b) conference (Table A-11), and 29% reported that e-discovery disputes arising later in the Pilot case were raised promptly with the court (Table A-12).

In terms of e-discovery topics discussed by counsel prior to beginning discovery, the most commonly reported was scope of relevant and discoverable ESI, 56%, followed by the scope of ESI to be preserved by the parties, 46%, and formats of production for ESI, 39% (Table A-13).

Fully 58% of attorney respondents reported that the Rule 26(b)(2)(C) proportionality standards *did not* play a significant role in the development of discovery plans in their pilot cases (Table A-14).

Attorney respondents were asked to rate the level of cooperation among opposing counsel in a series of questions about facilitation of discovery. In general, the most common response was adequate, on a 3-point scale from excellent to poor (Tables A-15–A-19. The exception was the question on proportionality—the most common response was "Not applicable" (Table A-19).

In terms of the questions about the effects of application of the Principles in their Pilot cases, attorney respondents tended to answer that application of the Principles had no effect:

- 83% of attorney respondents reported that application of the Principles in their Pilot case had no effect on preservation letters (Table A-35);
- 71% that application of the Principles had no effect on their ability to zealously represent their clients (Table A-21);
- 70% that the Principles had no effect on their ability to obtain relevant documents (Table A-24);
- 70% that the Principles had no effect on the length of the litigation (Table A-30);
- 68% that the Principles had no effect on the number of allegations of spoliation or other sanctionable conduct in their Pilot cases (Table A-25);
- 66% that the Principles had no effect on the length of the discovery period (Table A-29);
- 64% that the Principles had no effect on discovery with respect to another party's efforts to preserve or collect ESI (Table A-26);
- 62% that the Principles had no effect on the level of cooperation exhibited by counsel to efficiently resolve the case (Table A-20);
- 61% that the Principles had no effect on the parties' ability to resolve e-discovery disputes without court involvement (Table A-22);
- 56% that the Principles had no effect on total litigation costs (Table A-28);
- 55% that the Principles had no effect on the fairness of the e-discovery process (Table A-23);
- 55% that the Principles had no effect on the number of discovery disputes (Table A-31); and
- 54% that the Principles had no effect on discovery costs (Table A-27).

With respect to discovery costs and total litigation costs, 27% and 26% of attorney respondents, respectively, reported that application of the Principles in the Pilot cases had increased or greatly increased costs. But 40% of attorney respondents reported that the application of the Principles in their Pilot cases had increased or greatly increased the fairness of the e-discovery process (Table A-23), 36% that the Principles had increased or greatly increased the level of cooperation exhibited by counsel (Table A-20), and 35% that the Principles had increased or greatly increased the parties' ability to resolve e-discovery disputes without court involvement (Table A-22).

The most commonly reported type of e-discovery liaison was an employee of the party, 33%, although 36% of respondents reported that no e-discovery liaison was designated in the Pilot case. Attorney respondents tended to agree overwhelmingly with the statement that "The involvement of my client's e-discovery liaison has contributed to a more efficient discovery process," with only 3% disagreeing, and with the statement that "The involvement of the e-discovery liaison for the other party/parties has contributed to a more efficient e-discovery process," with only 7% disagreeing or disagreeing strongly.

Descriptive Tables Comparing Responses to Phase I and II Surveys for JUDGES

Table J-1. Not including your Pilot Program cases, how many of your cases in the last five years involved e-discovery issues?

Response	Phase I (%)	Phase II (%)
0 cases	0	8
1-2 cases	0	12
3-5 cases	23	23
6-10 cases	31	15
11-20 cases	23	15
More than 20 cases	23	27
N	13	26

Table J-2. The Seventh Circuit's Principles for e-discovery were developed by a committee and are being tested in selected Pilot Program cases, including yours. Please rate your familiarity with the substance of the Principles.

Response	Phase I (%)	Phase II (%)
0 - Not at all familiar	0	0
1	0	0
2	0	7
3	18	15
4	27	33
5 - Very familiar	55	44
N	11	27

Table J-3. Based on your observations at the initial status (FRCP 16(b)) conferences, please rate the extent to which the parties in your Pilot Program cases had conferred in advance on e-discovery issues (e.g., preservation, data accessibility, search methods, production formats, etc.).

Response	Phase I (%)	Phase II (%)
0 – No Discussion	0	0
1	9	4
2	27	11
3	64	30
4	0	44
5 Comprehensive Discussion	0	4
Not Applicable	0	7
N	11	27

Table J-4. Did the proportionality standards set forth in FRCP 26(b)(2)(C) play a significant role in the development of discovery plans for your Pilot Program cases?

Response	Phase I (%)	Phase II (%)
Yes	67	63
No	25	22
Not Applicable	8	15
N	12	27

Table J-5. Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the following: Levels of cooperation exhibited by counsel to efficiently resolve the case.

% of Respondents	Phase I (%)	Phase II (%)
Greatly Increased	31	22
Increased	54	56
No Effect	15	22
Decreased	0	0
Greatly Decreased	0	0
N	13	27

Table J-6. Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the following: Likelihood of an agreement on procedures for handling inadvertent disclosure of privileged information or work product under FRE 502.

Response	Phase I (%)	Phase II (%)
Greatly Increased	46	22
Increased	46	56
No Effect	8	22
Decreased	0	0
Greatly Decreased	0	0
N	13	27

Table J-7. Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the following: Extent to which counsel meaningfully attempt to resolve discovery disputes before seeking court intervention.

Response	Phase I (%)	Phase II (%)
Greatly Increased	46	15
Increased	46	52
No Effect	8	33
Decreased	0	0
Greatly Decreased	0	0
N	13	27

Table J-8. Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the following: Promptness with which unresolved discovery disputes are brought to the court's attention.

Response	Phase I (%)	Phase II (%)
Greatly Increased	15	4
Increased	46	48
No Effect	39	48
Decreased	0	0
Greatly Decreased	0	0
N	13	27

Table J-9. Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the following: The parties' ability to obtain relevant documents.

% of Respondents	Phase I (%)	Phase II (%)
Greatly Increased	7	7
Increased	62	59
No Effect	31	33
Decreased	0	0
Greatly Decreased	0	0
N	13	27

Table J-10. Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the following: Number of allegations of spoliation or other sanctionable misconduct regarding the preservation or collection of ESI.

Response	Phase I (%)	Phase II (%)
Greatly Increased	0	0
Increased	0	11
No Effect	62	48
Decreased	31	37
Greatly Decreased	8	4
N	13	27

Table J-11. Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the following: Length of the discovery period.

Response	Phase I (%)	Phase II (%)
Greatly Increased	0	0
Increased	0	15
No Effect	69	63
Decreased	31	22
Greatly Decreased	0	0
N	13	27

Table J-12. Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the following: Length of the litigation.

Response	Phase I (%)	Phase II (%)
Greatly Increased	0	0
Increased	0	7
No Effect	69	70
Decreased	31	22
Greatly Decreased	0	0
N	13	27

Table J-13. Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the following: Number of discovery disputes brought before the court.

Response	Phase I (%)	Phase II (%)
Greatly Increased	0	0
Increased	8	8
No Effect	8	44
Decreased	77	40
Greatly Decreased	8	8
N	13	25

Table J-14. Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the following: Number of requests for discovery of another party's efforts to preserve or collect ESI.

Response	Phase I (%)	Phase II (%)
Greatly Increased	0	0
Increased	8	19
No Effect	31	44
Decreased	54	33
Greatly Decreased	8	4
N	13	27

Table J-15. Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the following: Counsel's ability to zealously represent the litigants.

Response	Phase I (%)	Phase II (%)
Greatly Increased	8	4
Increased	31	23
No Effect	62	73
Decreased	0	0
Greatly Decreased	0	0
N	13	26

Table J-16. Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the following: The fairness of the e-discovery process.

Response	Phase I (%)	Phase II (%)
Greatly Increased	--	19
Increased	--	56
No Effect	--	26
Decreased	--	0
Greatly Decreased	--	0
N	--	27

Table J-17. Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the following: Counsel's demonstrated level of attention to the technologies affecting the discovery process.

Response	Phase I (%)	Phase II (%)
Greatly Increased	23	15
Increased	69	56
No Effect	8	30
Decreased	0	0
Greatly Decreased	0	0
N	13	27

Table J-18. Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the following: Your level of attention to the technologies affecting the discovery process.

Response	Phase I (%)	Phase II (%)
Greatly Increased	8	15
Increased	62	44
No Effect	31	37
Decreased	0	4
Greatly Decreased	0	0
N	13	27

Table J-19. Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the following: Counsel's demonstrated familiarity with their clients' electronic data and data systems

Response	Phase I (%)	Phase II (%)
Greatly Increased	8	15
Increased	83	69
No Effect	8	15
Decreased	0	0
Greatly Decreased	0	0
N	12	26

Table J-20. Based on filed materials and in-court interactions, please assess how application of the Principles to your Pilot Program cases has affected (or likely will affect) the following: Your understanding of the parties' electronic data and data systems for the appropriate resolution of disputes.

Response	Phase I (%)	Phase II (%)
Greatly Increased	15	7
Increased	69	63
No Effect	15	30
Decreased	0	0
Greatly Decreased	0	0
N	13	27

Table J-21. Please indicate your level of agreement with the following statement, as it relates to your Pilot Program cases : The involvement of e-discovery liaison(s) has contributed to a more efficient discovery process.

Response	Phase I (%)	Phase II (%)
Strongly Agree	46	33
Agree	54	30
Disagree	0	0
Strongly Disagree	0	0
Not Applicable	0	37
N	13	27

Table J-22. Do the Principles work better in some cases than in others?

Response	Phase I (%)	Phase II (%)
Yes	69	68
No	8	4
Not Applicable	23	28
N	13	25

Judge Comments

Please use the space below to explain why you believe the Principles had varying rates of success in different cases. What factors influenced their efficacy from case to case?

Cases vary in the volume of e-discovery, so naturally the Principles work better in those high-volume e-discovery cases.

Counsels' familiarity (or lack thereof) with the principles or e-discovery; counsels' differing degrees of willingness to be reasonable/civil

Don't believe the principles are successful or necessary.

I believe like many issues in discovery it is really dependent upon the cooperation of the attorneys involved.

I have only one case in the Pilot Project, so the sample size is not large enough to make a judgment.

I haven't noticed any difference in terms of the effect of the principles—but perhaps disputes are being played out before the assigned magistrate judges

I think the Principles apply in all cases, but they work better in cases where both sides are focused and see the value in concepts like proportionality, for example. In larger cases, the parties' self-interest sometimes reinforces the principles, which makes applying them easier.

I think the principles are great and would be helpful but haven't had to apply them yet.

If the case is more complicated—involving a wider variety of e-documents beyond just electronic mail—the principles help a lot.

In calendar 2011 in the [District], 23 patent lawsuits and 18 class action lawsuits were filed. All were subjected to this court's pre-existing and notoriously rigorous scheduling, disclosure and discovery dispute resolution procedures. In every case but one, the court allowed the parties to reach their own agreements regarding ESI production, with the court available pursuant to its

usual procedures to resolve any disputes that subsequently arose. No party or attorney ever sought additional direction or guidance from the court. Ironically, in the one case where the court predicted ESI disputes, and therefore prophylactically imposed the Principles in a court order, the predicted ESI disputes arose anyway and have required the same expenditure of time, money and energy by the parties, lawyers and the court as if the order never had been entered.

I've only had one case that involved any dispute over electronic discovery, and the issue was ultimately resolved consensually.

More experienced lawyers adopt the procedures immediately; whereas less experienced lawyers need to be educated along the way

Most of my cases were small ones where the parties did not bring e-discovery disputes to my attention so I don't really know what impact the Principles had, if any. In cases where the stakes are higher and significant e-discovery will be done, I would expect the Principles to be quite helpful.

My answer is based on speculation. I could not see any discernable difference in the pilot cases that I processed.

Necessary in big cases.

Rate of success varies according to the attitudes of the attorneys.

Some cases had more complex issues. The more complex the issues, the more helpful the principles were.

Some lawyers simply will not focus on ESI until a particular issue comes up. The lawyers who are attuned to ESI discovery issues welcome the Principles set out in the Standing Order to facilitate their discovery.

The Principles are needed more in some cases than others due to a number of factors that vary from case to case.

The Principles work the best when they are discussed at the beginning of the case. It is an iterative process and requires many meet and confers.

The success of these principles depends on the willingness of parties to both get into the details of their client's ESI practices and to be willing to be open with the other side in addressing this. Different lawyers and clients show varying levels of willingness to do so.

Which aspects of the Pilot Program Principles are the most useful?

Early identification and discussion of ESI—requests and preservation. I raise the Pilot Program at the initial status hearing, and it forces the lawyers to deal with planning e-discovery, which often they will not have up to that point. The involvement of technical personnel Implementing Evidence Rule 502: Many lawyers still are not aware of the potential benefits of that Rule.

Early identification of potential areas of dispute involving e-discovery.

In general, it prompts the parties to discuss e-discovery issues, if applicable, in advance of the Rule 16(b) conference.

Increasing awareness of the need to cooperate and work on protocols to anticipate problems and develop mechanisms for avoiding them altogether or resolving them.

My favorite Principle is proportionality, because I think that is an area that can really benefit the parties. Using sampling and exploring onerous issues incrementally can avoid a lot of empty rabbit holes while giving the parties a sense of what the case is worth (and maybe how to settle it) at an early stage.

Proportionality and liaison

Proportionality

Proportionality, Meet & Confer Requirements

Proportionality; getting an IT rep to discuss disputes prior to bringing them to court; protective orders

Simply the fact of their existence, which raises the level of awareness for the parties to determine the potential for any e-discovery problems in their case.

The discovery liaisons are of great value, plus the emphasis on cooperation and proportionality cut down the discovery disputes that arise and decrease the frustration level on the part of counsel and their clients toward the litigation process as a whole.

The educational programs that are offered free to the lawyers and judges. The role of the e-discovery liaison. The central role of cooperation.

The standards provide a uniform and default set of principles that need not be reinvented for each case, so that improves case management efficiency. More importantly, the principles set a standard of discovery behavior that will require an otherwise obstreperous lawyer/litigant to explain the deviation from best practices.

This court is not in a position to differentiate between the Principles because the litigants chose for themselves which principles to apply in which cases and seem to have chosen successfully.

How could the Pilot Program Principles be improved?

At this point, we have no suggestions to offer.

Consideration should be given as to whether to set default limitations as in, e.g., the Federal Circuit's proposed e-discovery default rules.

Eliminate them.

Fine as is.

I think it is going very well and have no specific suggestions for improvement.

If more judges and lawyers become more aware of the Principles and the beneifts derived from them, the whole pretrial discovery process would be improved.

If more judges and lawyers would participate.

If you are not getting sufficient feedback from attorneys, perhaps you could ask judges to seek feedback in individual cases after the cases are concluded, or have someone on the committee call the lawyers to inquire.

Involvement of all judges.

No recommendations

No specific suggestions come to mind

No suggestions at this time.

No suggestions at this time.

The Pilot Program Principles seem to be very effective. I have no specific suggestions to improve them.

Uncertain

We could have a third stage that addresses the admissibility of electronic evidence.

Descriptive Tables Comparing Responses to Phase I and II Surveys for ATTORNEYS

Table A-1. Attorney Characteristics Response	Phase I (%)	Phase II (%)
Average years in practice (years)	20	21
Main area of practice (%)		
Commercial litigation—not primarily class action	32	27
Commercial litigation—class action	18	9
Intellectual property	16	21
Employment/labor/employee benefits	14	16
Personal injury	8	6
Other	5	5
General practice	5	3
Civil rights	2	10
How many of your cases in the last 5 years have involved e-discovery? (%)		
0	8	5
1–2	16	16
3–5	24	20
6–10	19	23
11–20	14	12
More than 20	20	25
Please rate your familiarity with the substance of the Principles. (%)		
0 Not at all familiar	9	9
1	13	12
2	15	15
3	29	28
4	23	25
5 Very familiar	11	12
Party/parties you represented (select best) (%)		
Multiple defendants	20	25
Single defendant	30	34
Defendants in a class action	--	4
Multiple plaintiffs	21	4
Single plaintiff	30	27
Class action plaintiffs	--	6
Type of party you represented (select all) (%)		
Private individual	41	30
Government/government official	2	9
Publicly held company	20	23
Privately held company	51	43
Company with limited resources	--	11
Non-profit	0	3
Other	1	2
N	133	234

Table A-2. Please indicate the stage of the case. . .

Response	Phase I (%)	Phase II (%)
When selected for the pilot program		
FRCP 26(f) meet and confer	23	33
FRCP 16(b) initial status conference	43	30
Discovery	30	29
Mediation	4	4
Trial	0	3
N	133	234

Table A-3. How much of the information exchanged between the parties, in response to requests for documents and information, was (or likely will be) in electronic format?

Response	Phase I (%)	Phase II (%)
Less than 25%	36	41
Between 26% and 50%	16	13
Between 51% and 75%	15	16
More than 75%	33	29
N	132	227

Table A-4. Did (or do you anticipate that) ant requesting party (will) bear a material portion of the costs to produce requested ESI?

Response	Phase I (%)	Phase II (%)
Yes	30	23
No	70	77
N	131	226

Table A-5. Please indicate the role your client did (or likely will) play with respect to ESI.

Response	Phase I (%)	Phase II (%)
Primarily a requesting party	33	25
Equally a requesting and a producing party	25	27
Primarily a producing party	35	38
Neither a requesting nor a producing party	7	10
N	132	227

Table A-6. Please indicate whether your client's ESI connected with this case could be described as any of the following (Select all that apply).

Response	Phase I (%)	Phase II (%)
High volume of data (more than 100 GB or 40 custodians)	20	--
More than 500 GB or more than 25 custodians	--	8
100 GB–500 GB collected and up to 25 custodians	--	41
Legacy data (archive or obsolete system)	28	19
Disaster recovery data (backup)	8	2
Segregated data (special process, "confidential")	25	22
Automatically updated data (metadata)	15	8
Structured data (databases, applications)	37	22
Foreign data	3	0
N	133	234

Table A-7. At the outset of the case, you (or another member of your legal team) discussed the preservation of ESI with opposing counsel.

Response	Phase I (%)	Phase II (%)
Yes	51	49
No	36	29
Not applicable	13	22
N	130	231

Table A-8. Prior to meeting with opposing counsel, you became familiar with your client's electronic data and data system(s).

Response	Phase I (%)	Phase II (%)
Yes	62	63
No	22	16
Not applicable	16	21
N	127	229

Table A-9. At or soon after the FRCP 26(f) conference, the parties discussed potential methods for identifying ESI for production.

Response	Phase I (%)	Phase II (%)
Yes	56	46
No	26	30
Not applicable	18	23
N	131	228

Table A-10. Prior to the initial status conference (FRCP 16(b) conference), you met with opposing counsel to discuss the discovery process and ESI.

Response	Phase I (%)	Phase II (%)
Yes	45	41
No	36	35
Not applicable	19	24
N	129	229

Table A-11. At the initial status conference (FRCP 16(b) conference), unresolved e-discovery disputes were presented to the court.

Response	Phase I (%)	Phase II (%)
Yes	15	10
No	43	45
Not applicable	42	45
N	130	228

Table A-12. E-discovery disputes arising after the initial status conference (FRCP 16(b) conference) were raised promptly with the court.

Response	Phase I (%)	Phase II (%)
Yes	22	29
No	17	17
Not applicable	62	53
N	130	229

Table A-13. Please indicate the e-discovery topics discussed with opposing counsel prior to commencing discovery. If discovery has not commenced, please indicate the topics that have been discussed to this point Please check all that apply.

Response	Phase I (%)	Phase II (%)
Scope of ESI to be preserved by parties	48	46
Procedure for preservation of ESI	32	24
Scope of relevant and discoverable ESI	51	56
Search methodologies to identify ESI for production	34	29
Format(s) of production for ESI	49	39
Conducting e-discovery in phases or stages	25	16
Data requiring extraordinary collection measures	14	12
Procedures for handling privilege/work product	29	20
Timeframe for completing e-discovery	34	29
Any need for special procedures to manage ESI	13	8
Other	7	10
N	133	234

Table A-14. Did the proportionality factors set forth in FRCP 26(b)(2)(C) play a significant role in the development of the discovery plan?

Response	Phase I (%)	Phase II (%)
Yes	21	19
No	57	58
No discovery plan in case	22	23
N	131	226

Table A-15. Please assess the level of cooperation among opposing counsel in: Facilitating understanding of the ESI related to the case.

Response	Phase I (%)	Phase II (%)
Excellent	16	14
Adequate	48	43
Poor	12	17
Not applicable	25	26
N	130	228

Table A-16. Please assess the level of cooperation among opposing counsel in: Facilitating understanding of the data systems involved.

Response	Phase I (%)	Phase II (%)
Excellent	11	10
Adequate	40	42
Poor	12	14
Not applicable	37	34
N	130	228

Table A-17. Please assess the level of cooperation among opposing counsel in: Formulating a discovery plan.

Response	Phase I (%)	Phase II (%)
Excellent	21	17
Adequate	50	42
Poor	11	15
Not applicable	18	26
N	130	225

Table A-18. Please assess the level of cooperation among opposing counsel in: Reasonably limiting discovery requests and responses.

Response	Phase I (%)	Phase II (%)
Excellent	13	13
Adequate	42	38
Poor	21	23
Not applicable	24	26
N	131	226

Table A-19. Please assess the level of cooperation among opposing counsel in: Ensuring proportional e-discovery consistent with the factors listed in FRCP 26(b)(2)(C).

Response	Phase I (%)	Phase II (%)
Excellent	8	11
Adequate	38	33
Poor	16	20
Not applicable	38	37
N	129	228

Table A-20. Please assess how application of the Pilot Program Principles has affected (or likely will affect) the following: The level of cooperation exhibited by counsel to efficiently resolve the case.

Response	Phase I (%)	Phase II (%)
Greatly increased	2	2
Increased	33	34
No Effect	65	62
Decreased	0	1
Greatly decreased	1	1
N	128	221

Table A-21. Please assess how application of the Pilot Program Principles has affected (or likely will affect) the following: Your ability to zealously represent your client.

Response	Phase I (%)	Phase II (%)
Greatly increased	3	1
Increased	19	24
No Effect	74	71
Decreased	3	3
Greatly decreased	1	0
N	127	220

Table A-22. Please assess how application of the Pilot Program Principles has affected (or likely will affect) the following: The parties' ability to resolve e-discovery disputes without court involvement.

Response	Phase I (%)	Phase II (%)
Greatly increased	2	3
Increased	37	32
No Effect	61	61
Decreased	1	3
Greatly decreased	0	1
N	128	220

Table A-23. Please assess how application of the Pilot Program Principles has affected (or likely will affect) the following: The fairness of the e-discovery process.

Response	Phase I (%)	Phase II (%)
Greatly increased	6	2
Increased	37	38
No Effect	55	55
Decreased	2	3
Greatly decreased	1	2
N	126	217

Table A-24. Please assess how application of the Pilot Program Principles has affected (or likely will affect) the following: Your ability to obtain relevant documents.

Response	Phase I (%)	Phase II (%)
Greatly increased	3	3
Increased	27	25
No Effect	66	70
Decreased	3	2
Greatly decreased	1	0
N	125	216

Table A-25. Please assess how application of the Pilot Program Principles has affected (or likely will affect) the following: Allegations of spoliation or other sanctionable misconduct regarding the preservation or collection of ESI.

Response	Phase I (%)	Phase II (%)
Greatly increased	0	3
Increased	18	21
No Effect	73	68
Decreased	7	6
Greatly decreased	2	2
N	128	218

Table A-26. Please assess how application of the Pilot Program Principles has affected (or likely will affect) the following: Discovery with respect to another party's efforts to preserve or collect ESI.

Response	Phase I (%)	Phase II (%)
Greatly increased	1	3
Increased	26	29
No Effect	71	64
Decreased	2	3
Greatly decreased	1	1
N	127	214

Table A-27. Please assess how application of the Pilot Program Principles has affected (or likely will affect) the following: Discovery costs.

Response	Phase I (%)	Phase II (%)
Greatly increased	2	5
Increased	18	22
No Effect	57	54
Decreased	22	18
Greatly decreased	0	1
N	126	218

Table A-28. Please assess how application of the Pilot Program Principles has affected (or likely will affect) the following: Total litigation costs.

Response	Phase I (%)	Phase II (%)
Greatly increased	2	4
Increased	20	22
No Effect	58	56
Decreased	21	18
Greatly decreased	0	1
N	127	216

Table A-29. Please assess how application of the Pilot Program Principles has affected (or likely will affect) the following: Length of the discovery period.

Response	Phase I (%)	Phase II (%)
Greatly increased	2	3
Increased	12	21
No Effect	76	66
Decreased	9	10
Greatly decreased	1	1
N	127	216

Table A-30. Please assess how application of the Pilot Program Principles has affected (or likely will affect) the following: Length of the litigation.

Response	Phase I (%)	Phase II (%)
Greatly increased	2	2
Increased	12	18
No Effect	76	70
Decreased	10	8
Greatly decreased	0	1
N	127	217

Table A-31. Please assess how application of the Pilot Program Principles has affected (or likely will affect) the following: Number of discovery disputes.

Response	Phase I (%)	Phase II (%)
Greatly increased	2	4
Increased	13	20
No Effect	66	55
Decreased	18	20
Greatly decreased	2	2
N	126	215

Table A-32. Type of individual serving as your client's e-discovery liaison (Check all that apply).

Response	Phase I (%)	Phase II (%)
In-house counsel	20	20
Outside counsel	15	9
Third party consultant	10	9
Employee of the party	28	33
No e-discovery liaison designated	32	36
N	133	234

Table A-33. Please indicate your level of agreement with the following: The involvement of my client's e-discovery liaison has contributed to a more efficient discovery process.

Response	Phase I (%)	Phase II (%)
Strongly agree	8	7
Agree	39	40
Disagree	6	3
Strongly disagree	0	0
Not applicable	46	50
N	132	224

Table A-34. Please indicate your level of agreement with the following: The involvement of the e-discovery liaison for the other party/parties has contributed to a more efficient discovery process.

Response	Phase I (%)	Phase II (%)
Strongly agree	2	4
Agree	21	25
Disagree	8	6
Strongly disagree	1	1
Not applicable	69	64
N	130	223

Table A-35. How did application of the Principles affect preservation letters?

Response	Phase I (%)	Phase II (%)
Discouraged my client from sending	0	1
Resulted in client's letters being more targeted	7	16
No effect	93	83
N	127	217

Attorney Comments

Which aspects of the Pilot Program Principles are the most useful?

Again, we simply haven't gotten into e-discovery issues given the MDL petition that is pending

All of them. It is great guidance

Although we were selected to participate in the Pilot Program, the case settled before discovery began, so I have little to contribute to this survey.

Appointing client liaison

Cost effective means of obtaining discoverable records.

Developing an enforceable protocol.

Developing consistent protocols for discovery and controlling expense

Discussions/cooperation of counsel

E discovery in my case was fairly limited. The principles were not greatly relevant

Early cooperation

Early discussions about the scope and relevancy of e-discovery and efforts to obtain the information.

Early meet and confer with "teeth" discouraging bad behavior by litigants.

E-discovery was not exchanged in my case so we did not use many of the principles laid out by the Pilot Program

Emphasis on proportionality

Encouraging the meeting and discussing of the electronic discovery and involving liaison with technical knowledge.

First off, I applaud the 7th Circuit's efforts to address the issues litigators face with regard to electronic discovery. It's badly needed. The most beneficial principle is also the most dangerous—the principle dealing with cooperation. I agree that bilateral cooperation is absolutely critical in order to achieve the aims of the Pilot Program. It poses the considerable risk to the complying party, however, when the other party fails to cooperate and be forthcoming with discovery. I attempted to resolve certain discovery disputes without intervention from the Court, but my efforts were unsuccessful—and ended up prolonging discovery due to claims by the other side that the requested ESI would be forthcoming "promptly." When, I was finally left with no choice but to raise my ESI disputes with the Court, the Court declined to rule in a

manner consistent with (my understanding of) Pilot Program's stated principles. Specifically, an argument arose over the format of requested Emails. I had requested native format with intact metadata from the outset, yet I received—four months later—TIFF files with corrupted metadata. I explained that native format with metadata - was necessary due to certain authenticity concerns, but the Court declined to grant my request. I assume "proportionality" was the countervailing concern, as it was a Title VII, 42 U.S.C. § 1981 case. Cooperation in the e-discovery process is a fantastic goal. I just hope that the countervailing principle of "proportionality" doesn't end up undercutting the procedural opportunities of "small" litigants with lawsuits involving relatively modest amounts of money. I can certainly see how Title VII Plaintiffs could easily be placed at a major disadvantage in this regard. All an employer needs to do to undercut a claim is produce ESI as a PDF/paper/etc., then claim that the cost of "re-producing" ESI in outweighs or rivals the value of the case. It's something to think about when considering the weight of the "proportionality" principle.

Forces Big Firm Counsel to actually realize their duties for e-discovery

Forces ESI discussions up front; I believe it actually benefits Defendants by giving them an opportunity to voice burden concerns early, and have those issues addressed promptly.

Forces the parties to review and understand these issues and the scope of discovery in the case.

Forcing the parties to think and comprehend these issues at the outset of the case.

Frankly, getting this request was the first I became aware that this case was in a pilot e-discovery program

Guidelines help. Cost is obscene and encourages defendants to settle solely because of costs of complying with e-discovery.

Guiding the parties' expectations on e-discovery is most useful.

I am sorry to say that my case selected here was indeed a contentious multi-party ESI sanction hearing which resulted in a 5 day trial. The outcome was a severe ESI sanction against the defendants and none against their counsel, who were my clients. May I note threats of ESI spoliation sanctions are used as weapons by some litigators.

I didn't even recall that we were designated as part of the Pilot Program. My associate said that the judge in the case merely told us we would be part of the program without elaboration. It would be a much more useful program if the judge were to have distributed the principles when making the designation or directed us to them, or even just asked for some reporting back about how we implemented them. In this case, we asked for e-discovery and even brought a sanctions motion because the employer conceded that it allowed its e-mails to be destroyed after receiving our preservation letter and even after we filed the complaint. (Significantly, the complaint alleged that the supervisor was viewing pornography via e-mail in the workplace and those e-

mails, as well as others, were not preserved by the employer. There is no dispute that they existed, as our client had printed some out prior to being fired, so their destruction was not in dispute.) The judge denied the motion without prejudice and suggested we needed additional information to show willful destruction, but when we sent requests for the additional information, the employer objected and refused to answer such basic requests as identifying the name of its third party internet service provider (preventing our ability to subpoena records). We received no cooperation from them, the motion for sanctions we filed resulted in no remedy for the refusals to produce ESI, and while we filed a second motion to compel, the case settled before the court ruled on that motion.

I only served as Local Counsel in this case. I had no participation in any discovery

Mandatory early meet and confer with opposing counsel

Meet and confer

Meet and confer.

Moving cases faster

My client was dismissed early in the case so I really don't know what happened in discovery

n/a

N/A; discovery process not initiated.

na

No comments. Do not feel that I have been involved enough in the principles to evaluate.

No opinion

No opinion

None

None really

None, because our case has very limited ESI issues.

None.

Not applicable

Not applicable

Not applicable.

NOTE: my case settled either when an answer was filed or about then. We never had discovery.

Principle of proportionality.

Probably the best idea is full disclosure. But the entire concept favors larger Corporations

Process for early discussion of and agreement on discovery parameters. Unfortunately in this case, defendant's counsel appeared mainly interested in delaying case and forcing unnecessary costs on plaintiff by third party e-discovery fishing expeditions on our client and another third party and refused to set parameters or parties to be searched.

Provided a clearer framework for the parties to deal with e-discovery issues.

Provides a framework for handling e-discovery

Provides general guidelines. However, instead of providing middle of the road rules, I would suggest that there be bright-line default rules about the obligations of the parties that are changeable by the Court upon good cause shown, or by agreement of the parties.

Required cooperation of counsel to streamline process and identify responsive documents (separating wheat from the chaff) early on

Setting expectations.

Setting forth guidelines and principals to address these issues.

The “Principles” are useful as reminders for honest and “professional” attorneys who wish to provide electronic data when and where available. They have NO EFFECT attorneys (and their clients) determined NOT to produce and respond with relevant e-discovery. In fact, the Pilot Program and its guides merely give a dishonest and “stonewalling” counsel more rules and regulations, red-tape, to hide behind!

The case I am involved in is an insurance coverage dispute where no discovery is expected to be exchanged and the matter is expected to be resolved by way of summary judgment without discovery. Hence, this case has not provided me with any meaningful experience with the Pilot Program Principles.

The commitment of magistrate Judge Nolan and her significant commitment of time to address issues related to the Pilot served to greatly assist the parties in addressing ESI.

The cost-shifting provisions.

The early meeting and planning concepts. We did not use them in this case, as the principles were relatively new and neither party was extensively familiar with them during the bulk of discovery. But they have proven very helpful in other cases.

The fact that guidelines exist cuts down measurably on the amount of disputes as to discoverable material.

The guidelines helped to get both parties cooperating.

The meet and confer requirement; the requirement to discuss the types of e-discovery and ESI that may be at issue.

The most significant impact of the Pilot Program was the fact that the court was so engaged from the start of the case, giving us multiple hearings over the course of a week to essentially "train" the sides how to discuss these issues and to hammer home the point that the court took the Program seriously. The effect of that—coupled with the clarity of the program—has led to a unique level of cooperation over very contentious issues, which has led to increased professionalism and significantly decreased costs. The parties have been relying strongly on the written principles of the Pilot Program, which has facilitated cooperation and resolution when disputes arise.

The phases of the case in which I was involved, through settlements (in trial-level mediation and in settlement conference at the 7th Circuit), concluded before the start of the pilot program.

The program forced opposing counsel to address ESI issues early on, which was made it clear that—in this case—opposing counsel intended to use ESI and e-discovery issues as a litigation tool to impose costs on my clients, as opposed to facilitating the discovery of relevant information. It was helpful to know this early on.

The Program itself is a very good idea.

The requirement of meeting early to define boundaries and discuss e-discovery issues; proportionality. I feel the requirement that discovery be proportional required the other side to focus and not fish (wasting resources)

The requirement to confer regarding ESI early on in litigation is most beneficial for purposes of avoiding discovery disputes down the road.

This case did not involve much electronic data, therefore the program was not a good fit.

This case did not involve significant ESI.

This case settled without any discovery at all.

This case was not a good choice for the program because of the party size

This is an SEC enforcement action and my client is individual with few documents--very little effect

This was not a very good test case because it settled fairly early in the process.

Those taking into account making e-discovery efforts proportional to the amount/matter at issue in the case.

Unsure at this time. Our firm has limited exposure to e-discovery.

Until there are meaningful consequences for corporate defendants who refuse to produce discovery, no program, pilot or otherwise, will be useful.

We have only been in the cited case a few weeks. We were not aware we were part of the pilot program until receiving this survey.

How could the Pilot Program Principles be improved?

Addressing how e-discovery costs and efforts can sometimes skew the process and the end result in a manner that is not consistent with attaining justice.

At least as to non-parties, force the requesting party to bear the enormous cost (cost here for e-discovery to respond to plaintiff was nominal; cost to reply to defendant was over $300,000, virtually none of which was paid by defendant despite requests to the court to impose cost bearing). Stricter enforcement of burden/benefit analysis at least as to search of hard drives and backups.

At the most basic level, counsel needs to be better educated in the Pilot Program for it to have the greatest impact on the process. Too often, counsel is unfamiliar with the Program which undercuts its goals.

Because the program had limited application to this case, it is not possible to form useful opinions on the topic.

Because we did no discovery (we settled), I do not have an opinion.

Before the Pilot Program will help, attorneys continue to need more technical education to better understand EIS. Judges too, rely too much on the parties and continue to need more EIS education on the technical abilities, limitations and practical ways to review or search the EIS.

Better standards for proportionality based upon the amount at issue or size of the corporate party involved.

By requiring the parties to produce an actual e-discovery plan.

Can’t think of any

Can’t think of anything

Continued updating as the law develops and experiences increase. Continue outreach with practitioners.

Continuing to obtain practical input from practitioners on the Program Principles.

Cost and scope considerations in context of size and subject matter of cases

Court could discuss e-discovery topics at initial status.

Courts, especially designated magistrate judges, should more quickly compel recalcitrant discovery respondents to be transparent about their client's ESI storage capabilities.

Define that the requesting party pays for the costs incurred. 100%. The producing party should not bear the costs of having its own data produced to a party who bears the burden of proof.

Difficult to say, based on my experience.

Discovery generally is overly broad and burdensome - e-discovery gives requesting parties that much more leeway to engage in massively expensive fishing expeditions. The Pilot Program's flaws are less about the Program itself and more indicative of discovery generally—expensive, expansive, unfair. The Program purports to set standards for conduct, but ultimately judges will let a requesting party—typically the plaintiff—have anything and everything he asks for in whatever form he demands, with little to no recourse for the producing party who must shoulder the cost.

E-discovery was not exchanged in my case so we did not use many of the principles laid out by the Pilot Program

Education

Encouraging counsel to sit down and work through principles at early stage in case

Even less should be required to be produced.

Expanded use of it.

Fashion a better remedy for apportioning costs.

Fewer rules: more judicial recognition of lawyers who wish to cooperate with ediscovery in earnest and truthfully; and recognition of the “bad guys”!

Foreseeability with regard to how closely the Court will enforce discovery abuses is critical. Without consistent and serious sanctions for willfully or recklessly failing to cooperate with the other side in e-discovery, there will be every incentive for a party to attempt to “game the system.” In this regard, I totally agree with the recommendations outlined in the Facciola-Redgrave Framework (Volume 4, Issue 1 of the Federal Courts Law Review - 2009); parties will

be under far more pressure to meaningfully cooperate in discovery if they are abundantly aware that there will be major consequences for engaging in unfair or dishonest conduct.

Having a computer consultant was very helpful, but costly. Cost should be allocated more fairly.

I am a plaintiff lawyer that litigates consumer class action cases. Despite that I ask that defense counsel be well-versed in ESI issues (e.g., what relevant ESI exists where) defense counsel has NEVER known this information until after I file a motion to compel.

I dunno.

I have no specific suggestion, but generally keep them as short and simple as possible.

I think courts have to be more willing to address the potential merits of motions to dismiss and to weigh the potential merits of claims made before ordering extensive electronic discovery. Further, I have seen a disconnect between a magistrate and district court judge when the magistrate is assigned discovery issues including electronic discovery. The magistrate judge will not look to the merits of, for example, a pending motion to dismiss, before ruling on electronic discovery issues. This results in orders for substantial electronic discovery that may be completely unnecessary if a motion to dismiss is ultimately granted. If the program could focus on ways to address these issues I think this would also be helpful.

I think it still needs to be tailored better to individual cases. Many of the issues raised create issues and expense that are not necessary for many cases.

I think the business practices of smaller corporations and individuals need to be considered

Judges need to continue to force parties to be proportional, talk through disputes and demonstrate to the court their efforts. That way both sides work at it (give and take).

Keep things simple for “smaller” cases. The burdens of complying with a program should not outweigh the benefits. This is not a problem on big/huge cases but can be on smaller ones.

More aggressive control of requests to produce.

More guidance on cost assessments especially given the significant cost to conduct searches and recovery of documents from electronic databases and the little value in most of those searches for discovery purposes

More instructions to parties, to cut down on varying interpretations as attorneys argue about meanings.

More proactive efforts to limit overbroad and abusive discovery requests by opposing counsel.

More shifting of costs

More training of attorneys on e-discovery principles generally. The main problem in employment cases, however, is the reluctance of defense counsel to produce relevant information and the lack of consequences for taking the approach of "we'll produce it if the Court orders us on a motion to compel." E-discovery and the principles merely provide a new field on which to wage those same battles.

My clients struggle to understand why their discovery costs have quadrupled from 5–10 years ago, when e-mails and documents were typically produced via photocopied printouts. They are reluctant to use outside ESI vendors, whom they view as predatory. Accordingly, a standing order from the Court explaining the principles of ESI, and why the expenses associated with e-discovery are necessary, would be helpful.

n/a

N/A; discovery process not initiated.

na

No comments. Do not feel that I have been involved enough in the principles to evaluate.

NO idea

No insights from this case--from other cases mechanisms to ensure production of key e discovery early in the process are key

No opinion

no opinion

none

not applicable

Not applicable

Our case had no e-discovery and should not have been included in the pilot.

Please see answer to #23.

Require some sort of filing as evidence that they conferred similar to a case status filing, perhaps indicating on what issues the parties conferred, what is still outstanding, anticipated timelines, etc.

Sampling. It is often not necessary to produce the entire national database to understand whether the electronic discovery will be useful. Parties should be encouraged to first produce sample sets of the discovery that are agreed upon as "random" but without prejudice to the right to obtain the

entire electronic discovery or from all custodians and with assurance that the discovery not in the sample will be preserved and is required to be preserved. For class certification cases, 30(b)(6) depos on the scope of the e discovery should be allowed before these decisions are made. Often the defense is off producing terabytes of data and too many custodians that the plaintiffs never wanted and cannot afford to review because it is "responsive" when a sample would have sufficed. In McReynolds we did a sample of the local offices rather than production of all offices and that was sufficient to establish that the local office production was largely useless and repetitive of the national production. As putative class counsel, we could not make the decision to just forego the discovery without reviewing a sample of it. The sample saved money and time.

see #22

See answer to 22.

Simplify e-discovery. Most disputes do not warrant the expense of bringing in outside computer consultants and the cost to litigate on ediscovery issues ends up costing more than the issue at hand.

Specifying that liaison for e-discovery must be a non-attorney as allowing an attorney to be the liaison allows counsel to obstruct the information.

The program (and all e-disc) is set up based on Big Firm mentality and focus, there is little thought to the issues as it relates to single plaintiff's or even class collective plaintiffs. It's all focused on how a company is to act, and Big Firm Counsel, there is no guidance/information to the single plaintiff and small plaintiff firms, where issues are not about huge systems and well financed corporations, rather a client's single computer/phone/web-presence. This has resulted in the E-Disc being a tool of fear and intimidation, and a tool to force a plaintiff to settle because he/she is out spent.

The program could be improved by taking measures to ensure that attorneys implement the principles as opposed to simply telling them they are part of the pilot program without any further explanation or expectations. For lawyers representing individuals against large corporations, the ESI issue is often difficult and favors the corporation who is not only in possession of the vast majority of the ESI, but where the corporations are often far more sophisticated in ESI issues and have the resources of an IT department or outside vendors who are designated as their ESI consultants. Individuals, particularly in employment litigation who have most often just lost their livelihoods, are not in a position of affording ESI consultants, do not have access to the information on Defendant's servers, and—unless the client happened to be an IT professional—almost never have any specific IT expertise or even basic knowledge of their own. I think it is particularly important to be mindful in cases involving an individual v. a corporation that the parties are not at all equally situated and ESI costs are far more burdensome to an individual than to a corporation. I worry, from what I have seen in litigation already, that

corporations will use their greater IT sophistication and resources to make it very difficult, if not impossible, for an individual plaintiff to obtain electronic data.

There could be stronger enforcement provisions that Court's would implement.

This case did not involve significant ESI.

This was the first notice our case was part of the program.

Turn the principles into required rules

Uniform enforcement of NDILL patent rules.

Unknown.

F.2.b. Baseline Survey

Federal Judicial Center
Research Division (202) 502-4095

MEMORANDUM

DATE: March 19, 2012

TO: Chief District Judge James Holderman, Northern District of Illinois

FROM: Jason A. Cantone & Emery G. Lee III, Federal Judicial Center

SUBJECT: E-Discovery Pilot E-Filers Survey Results, Phase II

This Memorandum summarizes the findings of the baseline e-filer surveys conducted in March 2012 as part of Phase II of the Seventh Circuit E-Discovery Pilot Program. The findings of the judges' and attorneys' pilot surveys are summarized in a separate memorandum.

The survey was sent to 25,894 attorneys who were registered as e-filers in at least one of the seven districts in the Seventh Circuit; 6,631 replied, for a response rate of 26%.

After the executive summary, the Memorandum provides descriptive tables and additional analysis regarding differences (if any) between the Phase I and Phase II survey results.[1] The Memorandum also provides descriptive tables and analysis for new questions added to the Phase II survey that focus on attorneys' awareness of the Pilot Program and the resources it provides. The descriptive tables list the percentage of survey respondents for each of the answer options and the total number of survey respondents for each question.

Executive Summary: Baseline E-Filer Survey

The 6,631 Phase II attorney respondents represented a variety of types of practice and firm size, with 30% in a private firm of 2-10 attorneys and 14% in a private firm of 11-25 attorneys (Table 1). The Phase II respondents also reported that they litigate a wide range of cases in federal court. Twenty-two percent usually litigated employment discrimination cases, while 21% litigated contracts cases, 20% litigated civil rights cases, and 20% litigated complex commercial transactions cases (Table 2).

Forty-three percent of the Phase II respondents primarily represented defendants, 30% primarily represented plaintiffs, and 27% represented both equally (Table 3). The Phase II respondents

[1] Because of the large sample size, preliminary analysis suggests that even small differences between Phase I and Phase II results will reach standard levels of statistical significance. It is, then, better to review the results summarized here for substantive rather than statistical significance. For the most part, we do not find large differences between the Phase I and Phase II results in both the baseline e-filer survey and the judges' and attorneys' pilot surveys. The largest difference between the e-filer surveys was a 16% change—specifically, 22% of Phase II respondents from the Western District of Wisconsin reported that opposing counsel were "not knowledgeable" of or experienced with the discovery of electronically stored information and documents, down from 38% of Western District of Wisconsin respondents in Phase I.

were slightly more likely to represent plaintiffs and slightly less likely to represent defendants than the Phase I respondents (Table 4).

Both the Phase I and Phase II respondents reported high levels of cooperation in the discovery process. Seventy-seven percent of respondents in both Phase I and Phase II rated opposing counsel as cooperative or very cooperative and only 5% of respondents in Phase I and Phase II rated opposing counsel as very uncooperative (Tables 5 and 6). Fully 95% of respondents in both Phase I and Phase II rated their own level of cooperation in the discovery process as cooperative or very cooperative (Tables 7 and 8).

Twenty-two percent of respondents in Phase II reported that their cases always involve the discovery of electronically stored information and documents, an increase from the 17% of Phase I respondents (Tables 9 and 10).

The Phase II respondents were more likely to find opposing counsel to be knowledgeable of and experienced with the discovery of electronically stored information and documents, with 66% of Phase II respondents reporting that opposing counsel was very knowledgeable or knowledgeable, an increase from 61% of Phase II respondents (Tables 11 and 12).

The Phase II respondents were slightly more likely to rate themselves as knowledgeable of and experienced with the discovery of electronically stored information and documents; the difference was much less than for respondents' ratings of opposing counsel, perhaps because respondents typically tend to rate their own knowledge rather highly. Fully 76% of Phase II respondents reported themselves as very knowledgeable or knowledgeable, as compared to 73% of Phase II respondents (Tables 13 and 14).

In both Phase I and Phase II, the respondents were equally likely to report that the costs, required resources, and ease of identification and production of electronically stored information and documents in received Requests for Production were disproportionate (49%) or proportionate (51%) (Tables 15 and 16). There was also no change in how respondents reported proportionality in the responses to their own Requests for Production, with about one-third finding them disproportionate and about two-thirds finding them proportionate in both Phase I and Phase II (Tables 17 and 18).

The Phase II respondents rated themselves as more knowledgeable of and experienced with the Principles, with 30% of Phase II respondents rating themselves as very knowledgeable or knowledgeable, as compared to 26% of Phase I respondents (Tables 19 and 20).

The Phase II survey also included six new questions to gauge respondents' knowledge of the Pilot Program, including the web site, webinars, resources, and educational programs.

Thirty-five percent of respondents were aware of the Pilot Program's website (Table 21) and 18% reported that they had visited the Program's website (Table 22).

Thirty percent of respondents were aware that the Program has sponsored a series of webinars and that copies are available on the website (Table 23); 13% reported that they had viewed or listened to any of the Program's webinars (Table 24).

Seven percent of respondents reported that they had used any of the resources available on the Program's website (Table 25).

Eleven percent of respondents reported that they had participated in any of the educational programs offered by the Program (Table 26).

Descriptive Tables Comparing Responses to Phase I and Phase II Baseline E-filer Surveys

Tables 1 and 2 detail the responses to questions added to the Baseline E-filer survey for Phase II.

Table 1. Which of the following best describes your practice?

	% of Respondents							
Practice Type	ILC	ILN	ILS	INN	INS	WIE	WIW	Total
Private firm— sole practitioner	11	12	12	11	10	8	8	11
Private firm— 2-10 attorneys	35	27	36	34	32	29	26	30
Private firm— 11-25 attorneys	15	12	14	17	17	12	9	14
Private firm— 26-50 attorneys	5	8	8	10	8	7	9	8
Private firm— 51-100 attorneys	2	6	4	3	2	5	7	5
Private firm— 101-250 attorneys	7	7	4	4	7	12	14	7
Private firm— 251-500 attorneys	3	5	6	6	8	4	7	6
Private firm— More than 500 attorneys	5	12	7	7	8	9	8	10
House / corporate counsel	2	2	1	2	1	1	2	2
Federal government	4	3	5	4	2	5	3	3
State or local government	9	5	3	3	3	6	6	5
Other	2	1	1	1	1	1	1	1
N	411	3253	521	664	906	547	309	6611

Table 2. Which of the following types of cases do you usually litigate in federal court? Please select up to three options.

	% of Respondents							
Case Type	ILC	ILN	ILS	INN	INS	WIE	WIW	Total
Administrative law	2	2	3	3	2	3	3	2
Antitrust	0	4	1	0	1	2	1	2
Bankruptcy	9	9	7	10	11	10	11	10
Civil rights	31	19	17	24	18	21	20	20
Complex commercial transactions	13	24	15	15	16	21	17	20
Consumer protection	4	8	7	3	4	7	7	6
Contracts (generally)	15	22	12	21	20	25	16	21
Employment discrimination	26	20	16	30	24	16	21	22
Environmental law	1	2	5	2	5	6	3	3
ERISA	7	5	6	3	6	7	9	5
Insurance	6	7	7	16	12	11	7	9
Intellectual property	6	15	3	4	8	13	28	12
Labor law	10	6	4	6	7	5	6	6
Personal injury	18	11	34	25	20	8	8	16
Products liability	7	8	29	9	12	9	8	10
Professional malpractice	4	3	3	3	2	2	2	3
Securities	1	5	3	1	2	5	2	4
Torts (generally)	16	12	23	21	18	15	12	15
Other	16	11	13	7	9	12	13	11
N	411	3261	525	668	907	549	310	6631

Table 3. Do you typically represent plaintiffs, defendants, or both about equally?: Phase I

Districts	Plaintiffs	Defendants	Both equally / Mixed
ILC	27% (132)	55% (267)	18% (87)
ILN	24% (694)	47% (1367)	30% (872)
ILS	38% (216)	50% (289)	12% (68)
INN	28% (227)	49% (404)	23% (186)
INS	30% (306)	44% (448)	25% (256)
WIE	28% (208)	49% (364)	24% (177)
WIW	30% (72)	50% (120)	20% (47)
Average (*N* = 6807)	27% (1855)	48% (3259)	25% (1693)

Table 4. Do you typically represent plaintiffs, defendants, or both about equally?: Phase II

Districts	Plaintiffs	Defendants	Both equally / Mixed
ILC	33% (133)	49% (199)	19% (77)
ILN	28% (922)	41% (1336)	31% (995)
ILS	44% (231)	41% (213)	15% (79)
INN	28% (184)	47% (316)	25% (167)
INS	30% (274)	45% (411)	24% (220)
WIE	26% (144)	43% (238)	30% (166)
WIW	27% (83)	38% (115)	36% (109)
Average (*N* = 6612)	30% (1971)	43% (2828)	27% (1813)

The respondents for Phase II were slightly less likely to represent primarily defendants (43%) than were the respondents for Phase I (48%) and slightly more likely to represent primarily plaintiffs (30%) or both plaintiffs and defendants (27%) than respondents for Phase I (27% and 25%, respectively). In the Western District of Wisconsin, respondents for Phase II were more likely to represent both plaintiffs and defendants equally than in Phase I (36% vs. 20%) and less likely to represent primarily defendants (38% vs. 50%). All of the other districts provided similar responses in both surveys.

Table 5: Thinking of your federal cases in the past three years, please rate the level of cooperation demonstrated by opposing counsel in the discovery process: Phase I

Districts	Very uncooperative	Uncooperative	Cooperative	Very cooperative
ILC	6% (30)	14% (67)	65% (318)	15% (71)
ILN	5% (145)	22% (629)	68% (1978)	6% (175)
ILS	6% (36)	17% (98)	66% (375)	10% (59)
INN	4% (34)	14% (110)	71% (584)	11% (90)
INS	4% (37)	17% (172)	70% (709)	9% (94)
WIE	4% (32)	18% (130)	68% (508)	10% (72)
WIW	5% (12)	15% (36)	68% (159)	12% (27)
Average (N = 6787)	5% (326)	18% (1242)	68% (4631)	9% (588)

Table 6: Thinking of your federal cases in the past three years, please rate the level of cooperation demonstrated by opposing counsel in the discovery process: Phase II

Districts	Very uncooperative	Uncooperative	Cooperative	Very cooperative
ILC	6% (24)	17% (68)	66% (268)	11% (46)
ILN	5% (150)	22% (720)	67% (2169)	6% (209)
ILS	4% (22)	19% (98)	68% (351)	9% (48)
INN	3% (21)	14% (92)	73% (482)	10% (64)
INS	4% (35)	14% (123)	71% (639)	12% (104)
WIE	4% (22)	17% (91)	71% (385)	8% (42)
WIW	7% (21)	17% (51)	70% (216)	6% (19)
Average (N = 6580)	5% (295)	19% (1243)	69% (4510)	8% (532)

Across all of the districts, the level of cooperation demonstrated by opposing counsel in the discovery process did not change between Phase I and Phase II. Phase II respondents in the Western District of Wisconsin reported slightly more uncooperative conduct by opposing counsel, as compared to the Phase I respondents. The number reporting that opposing counsel was very cooperative fell from 12% to 6%, while the number reporting that opposing counsel was very uncooperative, uncooperative, or cooperative each increased by 2%. All of the other districts provided similar responses across both surveys.

Table 7: Thinking of the same cases, please rate the level of cooperation that you demonstrated in the discovery process: Phase I

Districts	Very uncooperative	Uncooperative	Cooperative	Very cooperative
ILC	6% (28)	1% (4)	58% (282)	36% (175)
ILN	4% (101)	2% (55)	69% (2016)	26% (753)
ILS	4% (25)	1% (8)	61% (345)	33% (187)
INN	4% (29)	1% (6)	63% (517)	32% (264)
INS	3% (27)	2% (20)	66% (672)	29% (294)
WIE	4% (27)	2% (13)	65% (481)	30% (220)
WIW	2% (5)	1% (3)	67% (155)	30% (70)
Average (N = 6782)	4% (242)	2% (109)	66% (4468)	29% (1963)

Table 8: Thinking of the same cases, please rate the level of cooperation that you demonstrated in the discovery process: Phase II

Districts	Very uncooperative	Uncooperative	Cooperative	Very cooperative
ILC	6% (25)	1% (4)	57% (230)	36% (146)
ILN	3% (106)	2% (69)	66% (2141)	29% (925)
ILS	4% (21)	1% (5)	62% (320)	33% (173)
INN	4% (24)	1% (3)	65% (426)	31% (204)
INS	3% (31)	1% (10)	62% (563)	33% (298)
WIE	2% (13)	2% (9)	69% (372)	27% (147)
WIW	3% (10)	1% (3)	72% (219)	24% (74)
Average (N = 6571)	4% (230)	2% (103)	65% (4271)	30% (1967)

Across all of the districts, the level of cooperation respondents stated that they demonstrated in the discovery process did not change between Phase I and Phase II. Respondents in the Western District of Wisconsin reported a downward shift from very cooperative to cooperative, with the percentage of Phase II respondents stating very cooperative going from 30% to 24% and the percentage of Phase II respondents stating cooperative rising from 67% to 72%. Respondents in the Northern District of Illinois showed the opposite trend, with Phase II respondents more likely to state very cooperative (29% in Phase II vs. 26% in Phase I) and less likely to state cooperative (66% in Phase II vs. 69% in Phase I). In all of the districts, the respondents overwhelmingly reported that they demonstrated cooperative or very cooperative behavior for both surveys.

Table 9. How often do your cases involve the discovery of electronically stored information and documents (e.g., e-mail, voice mail records, information from electronic databases)?: Phase I

Districts	Always	Frequently	Sometimes	Rarely	Never
ILC	8% (39)	29% (141)	34% (167)	24% (120)	5% (24)
ILN	21% (612)	31% (910)	29% (837)	17% (486)	3% (90)
ILS	13% (74)	31% (177)	30% (173)	21% (121)	5% (29)
INN	10% (81)	28% (225)	33% (268)	26% (210)	4% (34)
INS	18% (179)	30% (305)	30% (306)	20% (199)	3% (27)
WIE	19% (139)	34% (254)	28% (206)	16% (119)	4% (32)
WIW	19% (46)	34% (80)	27% (64)	16% (37)	4% (10)
Average (N = 6821)	17% (1170)	31% (2092)	30% (2021)	19% (1292)	4% (246)

Table 10. How often do your cases involve the discovery of electronically stored information and documents (e.g., e-mail, voice mail records, information from electronic databases)?: Phase II

Districts	Always	Frequently	Sometimes	Rarely	Never
ILC	14% (59)	26% (108)	35% (143)	20% (80)	5% (21)
ILN	26% (831)	30% (980)	27% (882)	14% (454)	3% (104)
ILS	19% (100)	26% (138)	30% (159)	21% (108)	4% (19)
INN	11% (72)	28% (185)	32% (213)	24% (159)	5% (36)
INS	19% (170)	30% (267)	30% (271)	18% (166)	3% (29)
WIE	22% (119)	30% (165)	30% (161)	15% (80)	4% (21)
WIW	28% (88)	31% (97)	24% (74)	12% (38)	4% (13)
Average (N = 6610)	22% (1439)	29% (1940)	29% (1903)	16% (1085)	4% (243)

The respondents for Phase II were more likely to report that their cases always involve the discovery of electronically stored information and documents, as compared to Phase I respondents (22% vs. 17%). Fifty-one percent of Phase II respondents reported that their cases always or frequently involved ESI discovery (a slight increase over the 48% of Phase I respondents).

Table 11. Thinking of the opposing counsel in your federal cases in the past three years, please rate the opposing counsel's level of knowledge of and experience with the discovery of electronically stored information and documents (e.g., e-mail, voice mail records, information from electronic databases): Phase I

Districts	Very knowledgeable	Knowledgeable	Not knowledgeable	Very unknowledgeable
ILC	6% (29)	51% (237)	40% (184)	2% (11)
ILN	4% (124)	55% (1560)	38% (1061)	3% (77)
ILS	5% (27)	56% (300)	36% (195)	2% (13)
INN	5% (39)	55% (426)	38% (294)	2% (15)
INS	4% (39)	58% (571)	36% (352)	2% (16)
WIE	5% (35)	57% (403)	36% (256)	2% (13)
WIW	2% (4)	59% (132)	38% (86)	1% (2)
Average (N = 6501)	5% (297)	56% (3629)	37% (2428)	2% (147)

Table 12. Thinking of the opposing counsel in your federal cases in the past three years, please rate the opposing counsel's level of knowledge of and experience with the discovery of electronically stored information and documents (e.g., e-mail, voice mail records, information from electronic databases): Phase II

Districts	Very knowledgeable	Knowledgeable	Not knowledgeable	Very unknowledgeable
ILC	4% (16)	60% (228)	33% (127)	3% (11)
ILN	5% (148)	61% (1904)	33% (1011)	2% (51)
ILS	9% (42)	60% (296)	30% (146)	2% (10)
INN	3% (18)	58% (359)	38% (236)	2% (11)
INS	5% (42)	58% (505)	35% (305)	2% (13)
WIE	4% (19)	65% (339)	30% (159)	1% (7)
WIW	5% (14)	71% (208)	22% (65)	2% (7)
Average (N = 6297)	5% (299)	61% (3839)	33% (2049)	2% (110)

The respondents in Phase II rated opposing counsel as more knowledgeable about the discovery of ESI than respondents in Phase I (61% vs. 56%) and were less likely to rate opposing counsel as not knowledgeable (33% vs. 37%). As compared to Phase I, the number of respondents who rated opposing counsel as very knowledgeable and knowledgeable increased in the Central District of Illinois (57% to 64%), Northern District of Illinois (59% to 66%), Southern District of Illinois (61% to 69%), Eastern District of Wisconsin (62% to 69%), and, most significantly, in

the Western District of Wisconsin (61% to 76%), but stayed about the same in the Northern District of Indiana (60% to 61%) and the Southern District of Indiana (62% to 63%).

Table 13. Please rate your own level of knowledge of and experience with the discovery of electronically stored information and documents: Phase I

Districts	Very knowledgeable	Knowledgeable	Not knowledgeable	Very unknowledgeable
ILC	6% (29)	63% (307)	28% (139)	3% (15)
ILN	10% (295)	64% (1880)	23% (672)	3% (80)
ILS	8% (46)	61% (346)	28% (160)	3% (18)
INN	7% (61)	65% (527)	26% (210)	2% (17)
INS	7% (74)	67% (676)	24% (242)	2% (22)
WIE	9% (66)	63% (466)	25% (188)	3% (25)
WIW	7% (16)	65% (154)	25% (60)	3% (7)
Average (N = 6798)	9% (587)	64% (4356)	25% (1671)	3% (184)

Table 14. Please rate your own level of knowledge of and experience with the discovery of electronically stored information and documents: Phase II

Districts	Very knowledgeable	Knowledgeable	Not knowledgeable	Very unknowledgeable
ILC	8% (34)	65% (263)	24% (98)	3% (11)
ILN	12% (386)	67% (2177)	19% (601)	2% (75)
ILS	11% (58)	63% (326)	24% (124)	2% (11)
INN	6% (37)	67% (439)	25% (162)	3% (22)
INS	9% (81)	65% (581)	25% (221)	2% (15)
WIE	7% (40)	67% (365)	24% (131)	2% (11)
WIW	12% (37)	67% (206)	19% (60)	2% (7)
Average (N = 6579)	10% (673)	66% (4357)	21% (1397)	2% (152)

Respondents for Phase II rated themselves as more knowledgeable about ESI discovery than did respondents for Phase I. As compared to Phase I, the number of respondents who rated themselves as very knowledgeable and knowledgeable increased in the Central District of Illinois (69% to 73%), Northern District of Illinois (74% to 79%), Southern District of Illinois (69% to 74%), Eastern District of Wisconsin (72% to 74%), and the Western District of Wisconsin (72% to 79%), but stayed about the same in the Northern District of Indiana (72% to 73%) and the Southern District of Indiana (74% in both).

Table 15. Thinking about the Requests for Production <u>received</u> in your federal cases in the past three years, please rate the level of proportionality the costs, resources required, and ease of identification and production of electronically stored information and documents: Phase I

Districts	Disproportionate	Proportionate
ILC	40% (179)	60% (264)
ILN	52% (1468)	48% (1340)
ILS	41% (215)	59% (313)
INN	45% (340)	55% (422)
INS	49% (470)	51% (493)
WIE	51% (352)	49% (338)
WIW	56% (122)	44% (97)
Average (N = 6413)	49% (3146)	51% (3267)

Table 16. Thinking about the Requests for Production <u>received</u> in your federal cases in the past three years, please rate the level of proportionality the costs, resources required, and ease of identification and production of electronically stored information and documents: Phase II

Districts	Disproportionate	Proportionate
ILC	44% (167)	56% (214)
ILN	51% (1594)	49% (1515)
ILS	41% (197)	60% (290)
INN	44% (278)	56% (352)
INS	50% (429)	51% (437)
WIE	50% (264)	50% (267)
WIW	52% (152)	49% (143)
Average (N = 6299)	49% (3081)	51% (3218)

Overall, the respondents in both Phase I and Phase II found that about 51% of the Requests for Production they received were proportionate. In the Central District of Illinois, the percentage of respondents rating them as proportionate decreased from 60% in Phase I to 56% in Phase II. In the Western District of Wisconsin, the percentage of respondents rating them as proportionate increased from 44% in Phase I to 49% in Phase II. The other five districts remained about the same across the surveys.

Table 17. Thinking about the responses to your Requests for Production in your federal cases in the past three years, please rate the level of proportionality the costs, resources required, and ease of identification and production of electronically stored information and documents: Phase I

Districts	Disproportionate	Proportionate
ILC	25% (114)	75% (334)
ILN	35% (988)	65% (1828)
ILS	27% (141)	73% (388)
INN	29% (221)	71% (542)
INS	35% (330)	65% (625)
WIE	35% (242)	65% (443)
WIW	40% (86)	60% (130)
Average (N = 6412)	33% (2122)	67% (4290)

Table 18. Thinking about the responses to your Requests for Production in your federal cases in the past three years, please rate the level of proportionality the costs, resources required, and ease of identification and production of electronically stored information and documents: Phase II

Districts	Disproportionate	Proportionate
ILC	28% (108)	72% (278)
ILN	34% (1056)	66% (2055)
ILS	27% (132)	73% (352)
INN	30% (191)	70% (438)
INS	32% (280)	68% (584)
WIE	32% (170)	68% (360)
WIW	31% (91)	69% (202)
Average (N = 6297)	32% (2028)	68% (4269)

Overall, the respondents in both Phase I and Phase II found that about two-thirds of the responses to their Requests for Production were proportionate. In the Central District of Illinois, the percentage of respondents rating them as proportionate decreased from 75% in Phase I to 72% in Phase II. In the Western District of Wisconsin, the percentage of respondents rating them as proportionate increased from 60% in Phase I to 69% in Phase II. In the Southern District of Indiana and the Eastern District of Wisconsin, the percentages of respondents rating them as proportionate increased from 65% in Phase I to 68% in Phase II. The other three districts remained about the same across the surveys.

Table 19. Please rate your own level of knowledge of and experience with respect to the Seventh Circuit Electronic Discovery Pilot Program Phase I Principles: Phase I

Districts	Very knowledgeable	Knowledgeable	Not knowledgeable	Very unknowledgeable
ILC	2% (9)	26% (127)	57% (274)	15% (75)
ILN	4% (105)	31% (894)	53% (1529)	13% (375)
ILS	1% (7)	23% (127)	59% (331)	18% (99)
INN	1% (7)	19% (156)	62% (502)	18% (144)
INS	1% (11)	19% (194)	59% (598)	21% (208)
WIE	2% (15)	16% (115)	58% (433)	24% (178)
WIW	3% (6)	12% (29)	62% (144)	24% (55)
Average (N = 6747)	2% (160)	24% (1642)	56% (3811)	17% (1134)

Table 20. Please rate your own level of knowledge of and experience with respect to the Seventh Circuit Electronic Discovery Pilot Program Phase I Principles: Phase II

Districts	Very knowledgeable	Knowledgeable	Not knowledgeable	Very unknowledgeable
ILC	2% (9)	26% (105)	57% (231)	15% (62)
ILN	4% (112)	31% (1007)	52% (1682)	13% (422)
ILS	1% (7)	20% (101)	60% (309)	19% (100)
INN	1% (8)	24% (155)	59% (384)	16% (106)
INS	1% (10)	20% (181)	60% (535)	18% (163)
WIE	2% (12)	23% (123)	59% (321)	16% (89)
WIW	3% (9)	24% (75)	54% (166)	19% (58)
Average (N = 6542)	3% (167)	27% (1747)	56% (3628)	15% (1000)

The Phase II respondents rated themselves as more knowledgeable of and experienced with the Principles, with 30% of Phase II respondents rating themselves as very knowledgeable or knowledgeable, as compared to 26% of Phase I respondents. The number rating themselves as not knowledgeable remained steady at 56%. Respondents in both the Western District and Eastern District of Wisconsin indicated increased knowledge and experience. Respondents in the Eastern District of Wisconsin were less likely to rate themselves as very unknowledgeable (24% in Phase I vs. 16% in Phase II) and more likely to rate themselves as knowledgeable (16% in Phase I vs. 23% in Phase II). Similarly, respondents in the Western District of Wisconsin were less likely to rate themselves as very unknowledgeable (24% in Phase I vs. 19% in Phase II) and more likely to rate themselves as knowledgeable (12% in Phase I vs. 24% in Phase II).

New Questions for Phase II

The following questions were added for the Phase II baseline e-filer survey.

Table 21. Are you aware of the Seventh Circuit Electronic Discovery Pilot Program's website, www.discoverypilot.com?

Districts	Yes	No
ILC	36% (149)	64% (261)
ILN	39% (1262)	61% (1974)
ILS	26% (132)	75% (386)
INN	32% (211)	68% (454)
INS	30% (270)	70% (629)
WIE	32% (172)	68% (372)
WIW	30% (93)	70% (215)
Average (N = 6580)	35% (2289)	65% (4291)

Thirty-five percent of respondents stated they were aware of the Program's website. Respondents in the Northern District of Illinois were the most likely to be aware (39%), while respondents in the Southern District of Illinois were the least likely to be aware (26%).

Table 22. Have you visited the Program's website?

Districts	Yes	No
ILC	19% (76)	81% (328)
ILN	22% (698)	78% (2520)
ILS	13% (66)	87% (450)
INN	16% (107)	84% (554)
INS	13% (114)	87% (779)
WIE	17% (93)	83% (451)
WIW	17% (51)	83% (252)
Average (N = 6539)	18% (1205)	82% (5334)

Eighteen percent of respondents stated they had visited the Program's website. Respondents in the Northern District of Illinois were the most likely to have visited (22%), while respondents in the Southern District of Illinois and Southern District of Indiana were the least likely to be aware (both at 13%).

Table 23. Are you aware of the fact that the Program has sponsored a series of webinars, and that copies of those webinars are available on the Program's website?

Districts	Yes	No
ILC	35% (140)	65% (259)
ILN	34% (1097)	66% (2117)
ILS	23% (117)	78% (402)
INN	27% (178)	73% (479)
INS	24% (211)	76% (675)
WIE	26% (141)	74% (397)
WIW	27% (82)	73% (226)
Average (N = 6521)	30% (1966)	70% (4555)

Thirty percent of respondents stated they were aware of the Program's webinars. Respondents in the Central District of Illinois were the most likely to be aware (35%), while respondents in the Southern District of Illinois were the least likely to be aware (23%).

Table 24. Have you viewed or listened to any of the Program's webinars?

Districts	Yes	No
ILC	13% (54)	87% (349)
ILN	15% (486)	85% (2714)
ILS	6% (32)	94% (485)
INN	13% (85)	87% (567)
INS	9% (78)	91% (809)
WIE	11% (59)	89% (479)
WIW	12% (37)	88% (270)
Average (N = 6504)	13% (831)	87% (5673)

Thirteen percent of respondents stated they had viewed or listened to the Program's webinars. Respondents in the Northern District of Illinois were the most likely (15%), while respondents in the Southern District of Illinois were the least likely (6%) to have viewed or listened to any of the webinars.

Table 25. Have you used the Seventh Circuit and National E-discovery case law lists, or any of the other resources available on the Program's website?

Districts	Yes	No
ILC	9% (34)	92% (367)
ILN	8% (266)	92% (2946)
ILS	4% (18)	97% (497)
INN	6% (40)	94% (614)
INS	5% (41)	95% (854)
WIE	6% (32)	94% (510)
WIW	7% (22)	93% (287)
Average (N = 6528)	7% (453)	93% (6075)

Seven percent of respondents stated they had used the case law lists or any resources available on the website. Respondents in the Central District of Illinois were the most likely (9%), while respondents in the Southern District of Illinois were the least likely (4%) to have used the available resources.

Table 26. Have you participated in any of the educational programs offered by the Program?

Districts	Yes	No
ILC	11% (45)	89% (363)
ILN	13% (424)	87% (2805)
ILS	5% (27)	95% (491)
INN	9% (58)	91% (603)
INS	7% (66)	93% (832)
WIE	9% (51)	91% (493)
WIW	11% (34)	89% (275)
Average (N = 6567)	11% (705)	89% (5862)

Eleven percent of respondents stated they had participated in the Program's educational programs. Respondents in the Northern District of Illinois were the most likely (13%), while respondents in the Southern District of Illinois were the least likely (5%) to have participated.

G. Media Coverage

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SEVENTH CIRCUIT'S **ELECTRONIC DISCOVERY** PILOT PROGRAM

The Editor interviews Hon. James F. **Holderman**, Chief District Judge, U.S. District Court, Northern District of **Illinois**.

Editor: Why is e-discovery a pressing issue for our justice system?

Holderman: Electronically stored information ("ESI") touches all aspects of our lives. The convenience offered by constantly improving technology has expanded the volume of communications such that **electronic discovery** needs to be addressed in virtually all state and **federal** litigation.

In coping with e-discovery, we have largely relied on the same paper discovery procedures that we used for the last century. It is apparent that those procedures are outdated. The reason we put together the Seventh Circuit Pilot Program was to develop a new approach based on a set of Principles directed specifically to the issues raised by e-discovery.

Whenever I speak to bar groups or to business executives, they tell me that something has to be done about e-discovery. They mention that because it is so expensive, burdensome and time consuming, it causes them sometimes to make decisions to settle unmeritorious suits. That is just not right.

Editor: Please tell us about the E-Discovery Committee.

Holderman: Conceived initially as a committee to work with the United States District Court for the Northern District of **Illinois**, I appointed lawyers and non-lawyers who are experts in the field of ESI to the E-Discovery Committee to develop a new approach based on a set of Principles directed specifically to the issues raised by e-discovery.

The Committee is chaired by United States Magistrate Judge Nan Nolan. It quickly expanded to include more than forty experts in the field of **electronic discovery**.

The E-Discovery Committee members include private practitioners from the full spectrum of the bar (plaintiff, defense and government) who are leaders in the area of **electronic discovery**, in-house counsel at companies who regularly face the challenges of discovery in organizations with large and complex electronic systems, and experts from **electronic discovery** vendors who regularly collect and process electronically stored information.

The E-Discovery Committee members identified three major areas of focus and formed three corresponding sub-committees: a Preservation sub-committee chaired by James Montana, Jr.. of Vedder Price PC; an Early Case Assessment subcommittee co-chaired by Karen Quirk of Winston & Strawn LLP and Tom Lidbury of Mayer Brown; and an Education subcommittee, co-chaired by Mary Rowland of Hughes Socol Piers Resnick & Dym Ltd. and Kate Kelly of the U.S. Attorney's Office. An additional subcommittee concerned with developing the surveys to gather the data was co-chaired by Joanne McMahon of General Electric and Natalie Spears of Sonnenschein Nath & Rosenthal LLP. Each E-Discovery Committee member joined at least one and often two subcommittees.

All those involved with the E-Discovery Committee deserve great praise for their efforts with particular praise going to the chairs and co-chairs of the subcommittees who devoted untold hours to completing the tasks assigned to their subcommittees.

Editor: Principle 1.01 (Purpose) states that the purpose of the Principles is to secure the "just, speedy, and inexpensive determination of every civil case, and to promote, whenever possible, the early resolution of disputes regarding the discovery of electronically stored information without Court intervention." That says a lot in a few words.

Holderman: What that says is that purpose of the Principles being applied in the Pilot Program is simply to implement the language you quoted, which states the primary basis of the **Federal** Rules of Civil Procedure (FRCP). What we are doing is developing procedures that enable the purposes of the FRCP to be achieved in the 21st century and make them work for the types of discovery that are necessary in litigation today.

That was the driving force behind our E-Discovery Committee's work and the Principles that it developed. The purpose of the Pilot Program is to test those Principles by applying them to the real world situations reflected in cases before the courts in the Seventh Circuit. It will help us answer questions like: What procedures should we change? How can we adjust the procedures that we have to make them fit the new courtroom realities?

I really believe that we need to change the culture of litigation in the **federal** courts in the United States. I don't believe that the old hardball approach of "ask for everything, give nothing" works today. We are hoping to convince lawyers that cooperation in seeking the truth is consistent with the concept of zealous advocacy in furthering a client's interest. There has to be a sea change in the approach to discovery. Principle 1.02 (Cooperation) puts teeth in the requirement that the parties cooperate. It states: "The failure of counsel or the parties to litiga-

tion to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions."

Editor: Principle 1.03 (Discovery Proportionality) stresses the need for proportionality. Was this Principle intentionally positioned high on the list?

Holderman: Yes. We just discussed the need for the parties to cooperate to achieve a just result given the explosion of ESI. If the courts don't act, many litigation outcomes will be determined by the burdens of e-discovery rather than on the merits. That's where "proportionality" comes into play.

Lawyers for the parties should at the outset estimate the dollar value of the recovery that is possible in the case and then keep the cost of e-discovery proportionate to that amount. Simply stated, they need to cooperate to evaluate how much e-discovery is reasonable under those circumstances.

Editor: Tell us why Principle 2.01 that requires the parties to meet-and-confer on discovery and to identify disputes for early resolution is important.

Holderman: Essentially what we are talking about is early case assessment. For best results, this should take place in a pre-litigation setting before the lawsuit is even filed. This provides counsel for each of the parties with an opportunity to assess the strengths and weaknesses of their respective cases, including how e-discovery can best be handled given the coordination and proportionality requirements. This needs to be addressed right away, not several months into the litigation.

Editor: Doesn't that pretty much move in the direction of requiring the plaintiff to provide specific facts about the basis for the complaint? How can the discoverable "ESI" to be preserved and produced be determined unless the plaintiff comes forward with the specific facts on which its case is based?

Holderman: It cannot be done, and that is why the plaintiff needs to cooperate by divulging that information at the outset. Hiding the ball is a concept from the last century that can't be a part of present-day litigation. This is reflected in the Supreme Court's decisions in Iqbal and Twombly. Discovery is expensive and let's get the information out early. What is the benefit of bare-bones pleadings when the expense of e-discovery is so great? If the plaintiff has information then let's see whether the plaintiff has a sufficient basis for going forward to withstand a motion for summary judgment.

Editor: Another point that strikes me as being important is that doing discovery in phases is among the matters to be considered at the meet-and-confer conference.

Holderman: The fact that you may not have another crack at e-discovery later puts pressure on the parties to put all their cards on the table at that conference Editor: Paragraph (b) of Principle 2.01 provides that any disputes regarding ESI that counsel for the parties are unable to resolve shall be presented to the court at the initial status

conference in Principle 2.01. Paragraph (d) provides that "If the court determines that any counsel or party in a case has failed to cooperate and participate in good faith in the meet-and-confer process or is impeding the purpose of the Principles, the Court may require additional discussions prior to the commencement of discovery, and may impose sanctions, if appropriate." What is the purpose of these provisions?

Holderman: They are supposed to cause the lawyers to be motivated. If there are disputes that the parties are unable to resolve then we want them presented to the court as early as possible. The whole idea is "let's not go down blind alleys"; let's focus on what will be essential for the plaintiff and the defendant to get to the merits of the case. We want to encourage the parties to cooperate to solve any disputes and let them know that if they don't, sanctions will be applied.

These Principles are really just a recitation of what is available in the FRCP anyway and a reaffirmation that there may be sanctions. Frankly, sanctions for failure to cooperate are relatively rare. Given the proliferation of ESI in the second decade of the 21st century, courts recognize that failures to cooperate causes unnecessary expense for both parties and that some sanction should be imposed.

Editor: Why will the appointment of an e-discovery liaison pursuant to Principle 2.02 be helpful?

Holderman: The meet-and-confer conference is essential to reducing the cost of e-discovery. If a lawyer comes to the conference and is not familiar with ESI concepts, we need to have somebody at the conference who can help achieve the most efficient production at the least cost so that we can maintain the concept of proportionality. You just have to have a technical person who understands the client's system.

Editor: Principle 2.03 deals with preservation requests and orders. It states that "Vague and overly broad preservation requests do not further the goals of these Principles and are therefore disfavored."

Holderman: We shouldn't require any party to maintain information that is not going to be essential to discovery. A party will not be sanctioned if there isn't cooperation from the party seeking the discovery in providing specific facts that provide a basis for determining what needs to be maintained. This is reinforced by paragraph (c) of Principle 2.04 which states that "The parties and counsel should come to the meet-and-confer conference prepared to discuss the claims and defenses in the case including specific issues."

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---- INDEX REFERENCES ---

COMPANY: GENERAL ELECTRIC FINANCING CV; GENERAL ELECTRIC CO; FU JIAN SHUI NI GU FEN YOU XIAN GONG SI; UNIVERSITY OF DENVER; EMIRATES STEEL INDUSTRIES CO; PILOT; GENERAL ELECTRIC CAPITAL CANADA INC; HUGHES SOCOL PIERS RESNICK AND DYM LTD; ESI; SONNENSCHEIN NATH AND ROSENTHAL; GENERAL ELECTRIC CAPITAL ASIA INVESTMENTS INC; PILOT CORP

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Seventh Circuit's Electronic Discovery Pilot Program

The Editor interviews ***Hon. James F. Holderman****, Chief District Judge, U.S. District Court, Northern District of Illinois.*

Editor: Why is e-discovery a pressing issue for our justice system?

HIGHLIGHTS

Some Of The Above Partner With Corporate Counsel By Providing Us With Financial And Editorial Support.

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Holderman: Electronically stored information ("ESI") touches all aspects of our lives. The convenience offered by constantly improving technology has expanded the volume of communications such that electronic discovery needs to be addressed in virtually all state and federal litigation.

In coping with e-discovery, we have largely relied on the same paper discovery procedures that we used for the last century. It is apparent that those procedures are outdated. The reason we put together the Seventh Circuit Pilot Program was to develop a new approach based on a set of Principles directed specifically to the issues raised by e-discovery.

Whenever I speak to bar groups or to business executives, they tell me that something has to be done about e-discovery. They mention that because it is so expensive, burdensome and time consuming, it causes them sometimes to make decisions to settle unmeritorious suits. That is just not right.

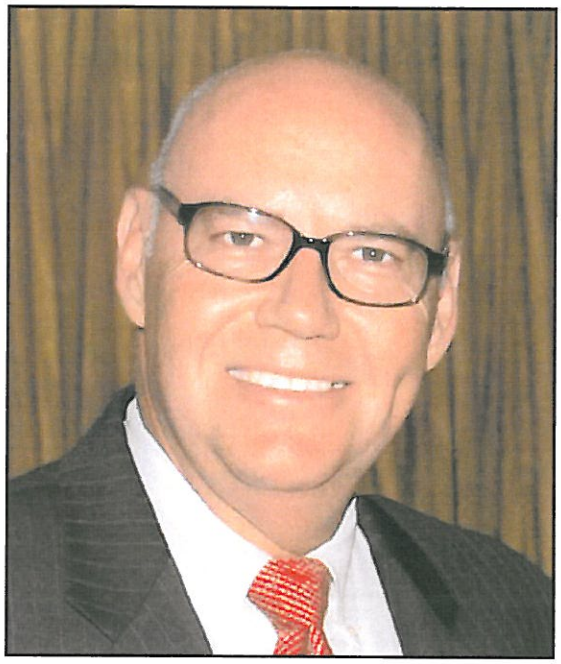
Editor: Please tell us about the E-Discovery Committee.

Holderman: Conceived initially as a committee to work with the United States District Court for the Northern District of Illinois, I appointed lawyers and non-lawyers who are experts in the field of ESI to the E-Discovery Committee to develop a new approach based on a set of Principles directed specifically to the issues raised by e-discovery.

The Committee is chaired by United States Magistrate Judge Nan Nolan. It quickly expanded to include more than forty experts in the field of electronic discovery.

The E-Discovery Committee members include private practitioners from the full spectrum of the bar (plaintiff, defense and government) who are leaders in the area of electronic discovery, in-house counsel at companies who regularly face the challenges of discovery in organizations with large and complex electronic systems, and experts from electronic discovery vendors who regularly collect and process electronically stored information.

The E-Discovery Committee members identified three major areas of focus and formed three corresponding subcommittees: a Preservation subcommittee chaired by James Montana, Jr., of Vedder Price PC; an Early Case Assessment subcommittee co-chaired by Karen Quirk of Winston & Strawn LLP and Tom Lidbury of Mayer Brown; and an Education subcommittee, co-chaired by Mary Rowland of Hughes Socol Piers Resnick & Dym Ltd. and Kate Kelly of the U.S. Attorney's Office. An additional subcommittee concerned with developing the surveys to gather the data was co-chaired by Joanne McMahon of General Electric and Natalie Spears of Sonnenschein Nath & Rosenthal LLP. Each E-Discovery Committee member joined at least one and often two subcommittees.



The Hon. James F. Holderman

All those involved with the E-Discovery Committee deserve great praise for their efforts with particular praise going to the chairs and co-chairs of the subcommittees who devoted untold hours to completing the tasks assigned to their subcommittees.

Editor: Principle 1.01 (Purpose) states that the purpose of the Principles is to secure the "just, speedy, and inexpensive determination of every civil case, and to promote, whenever possible, the early resolution of disputes regarding the discovery of electronically stored information without Court intervention." That says a lot in a few words.

Holderman: What that says is that purpose of the Principles being applied in the Pilot Program is simply to implement the language you quoted, which states the primary basis of the Federal Rules of Civil Procedure (FRCP). What we are doing is developing procedures that enable the purposes of the FRCP to be achieved in the 21st century and make them work for the types of discovery that are necessary in litigation today.

That was the driving force behind our E-Discovery Committee's work and the Principles that it developed. The purpose of the Pilot Program is to test those Principles by applying them to the real world situations reflected in cases before the courts in the Seventh Circuit. It will help us answer questions like: What procedures should we change? How can we adjust the procedures that we have to make them fit the new courtroom realities?

I really believe that we need to change the culture of litigation in the federal courts in the United States. I don't believe that the old hardball approach of "ask for everything, give nothing" works today. We are hoping to convince lawyers that cooperation in seeking the truth is consistent with the concept of zealous advocacy in furthering a client's interest. There has to be a sea change in the approach to discovery. Principle 1.02 (Cooperation) puts teeth in the requirement that the parties cooperate. It states: "The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions."

Editor: Principle 1.03 (Discovery Proportionality) stresses the need for

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E-Discovery Pilot

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proportionality. Was this Principle intentionally positioned high on the list?

Holderman: Yes. We just discussed the need for the parties to cooperate to achieve a just result given the explosion of ESI. If the courts don't act, many litigation outcomes will be determined by the burdens of e-discovery rather than on the merits. That's where "proportionality" comes into play.

Lawyers for the parties should at the outset estimate the dollar value of the recovery that is possible in the case and then keep the cost of e-discovery proportionate to that amount. Simply stated, they need to cooperate to evaluate how much e-discovery is reasonable under those circumstances.

Editor: Tell us why Principle 2.01 that requires the parties to meet-and-confer on discovery and to identify disputes for early resolution is important.

Holderman: Essentially what we are talking about is early case assessment. For best results, this should take place in a pre-litigation setting before the lawsuit is even filed. This provides counsel for each of the parties with an opportunity to assess the strengths and weaknesses of their respective cases, including how e-discovery can best be handled given the coordination and proportionality requirements. This needs to be addressed right away, not several months into the litigation.

Editor: Doesn't that pretty much move in the direction of requiring the plaintiff to provide specific facts about the basis for the complaint? How can the discoverable "ESI" to be preserved and produced be determined unless the plaintiff comes forward with the specific facts on which its case is based?

Holderman: It cannot be done, and that is why the plaintiff needs to cooperate by divulging that information at the outset. Hiding the ball is a concept from the last century that can't be a part of present-day litigation. This is reflected in the Supreme Court's decisions in *Iqbal* and *Twombly*. Discovery is expensive and let's get the information out early. What is the benefit of bare-bones pleadings when the expense of e-discovery is so great? If the plaintiff has information then let's see whether the plaintiff has a sufficient basis for going forward to withstand a motion for summary judgment.

Editor: Another point that strikes me as being important is that doing discovery in phases is among the matters to be considered at the meet-and-confer conference.

Holderman: The fact that you may not have another crack at e-discovery later puts pressure on the parties to put all their cards on the table at that conference

Editor: Paragraph (b) of Principle 2.01 provides that any disputes regarding ESI that counsel for the parties are unable to resolve shall be presented to the court at the initial status conference in Principle 2.01. Paragraph (d) provides that "If the court determines that any counsel or party in a case has failed to cooperate and participate in good faith in the meet-and-confer process or is impeding the purpose of the Principles, the Court may require additional discussions prior to the commencement of discovery, and may impose sanctions, if appropriate." What is the purpose of these provisions?

Holderman: They are supposed to cause the lawyers to be motivated. If there are disputes that the parties are unable to resolve then we want them presented to the court as early as possible. The whole idea is "let's not go down blind alleys"; let's focus on what will be essential for the plaintiff and the defendant to get to the merits of the case. We want to encourage the parties to cooperate to solve any disputes and let them know that if they don't, sanctions will be applied.

These Principles are really just a recitation of what is available in the FRCP anyway and a reaffirmation that there may be sanctions. Frankly, sanctions for failure to cooperate are relatively rare. Given the proliferation of ESI in the second decade of the 21st century, courts recognize that failures to cooperate causes unnecessary expense for both parties and that some sanction should be imposed.

Editor: Why will the appointment of an e-discovery liaison pursuant to Principle 2.02 be helpful?

Holderman: The meet-and-confer conference is essential to reducing the cost of e-discovery. If a lawyer comes to the conference and is not familiar with ESI concepts, we need to have somebody at the conference who can help achieve the most efficient production at the least cost so that we can maintain the concept of proportionality. You just have to have a technical person who understands the client's system.

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DuPont Legal

Continued from page 6

gals to drive the process and bring consistency across our matters. We know that e-discovery is really the 800-pound gorilla, and we continue to try to drive down those costs whenever we can.

One of the other initiatives that DuPont Legal has pushed particularly hard over the last six years is what we call our Recoveries Initiative. This is our effort to go beyond just trying to minimize or control costs by helping various DuPont business units bring in more income by way of recoveries. By that we essentially mean not leaving money on the table that rightfully belongs to DuPont and its shareholders by pursuing everything from IP to insurance to tax-related issues in which DuPont can realize a recovery. Often this occurs before litigation is ever necessary.

We have also provided incentives to our law firms to seek out recovery opportunities and bring us new ideas. When we need to pursue litigation, we've done that usually through an attractive alternative fee arrangement. In some cases, we have offered a firm a pure contingency arrangement in which they will get a percentage of any recovery.

In the past some of these recoveries might not have been pursued. Now we look at all these opportunities and consider pursuing them when appropriate. Most are not pursued by litigation but rather by discussions at a business level or through ADR-like mediation.

The good news is that over the last two years we have helped bring in more money through these kinds of efforts than DuPont Legal's total annual operating budget. In Chapter 13 of our new book, *The New Reality*, we detail the various steps we've taken and the success we've had with the Recoveries Initiative.

Deery: In this tough economic environment we've also taken an extremely hard look at our patent portfolio to make absolutely sure that we cull out and no longer protect technologies that are no longer worthy of that protection. We also look for opportunities to license our patents where appropriate.

We have a very active Six Sigma program, and that has really served us well in terms of taking a look at defects that we have within our processes and eliminating them. We also have been very aggressive in the use of mediation and settlements to head off the much greater cost and uncertainties of litigation.

In addition, we do all the things other companies do in the tough economic environment. We have head count control, we limited the number of consultants we have on board, and we've restricted our travel and have gotten far more creative in using alternative approaches to jumping on planes and visiting people. We have put in place training processes so that most of our attorneys do not have to travel to get their CLE credits. We utilize offshore resourcing whenever we can, and we have had some exposure to limiting wage increases and giving people the opportunity to take a furlough if they so desire.

For more information about controlling legal costs and the other initiatives of DuPont Legal and its Network of law firms and service providers, visit www.dupontlegalmodel.com. Orders for copies of The New Reality *can also be placed on the website.*

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E-Discovery Guidelines and the Seventh Circuit's Pilot Program

March 12, 2010

by Ashly Iacullo and Ian J. Block, Trademark Attorneys

Overbroad discovery requests and acrimony between parties add to litigation costs on both sides of a lawsuit. In an age in which litigants literally are able to produce terabytes of material—which can take thousands of man-hours to digest and analyze—e-discovery's rising prevalence in federal litigation amplifies the potential cost of discovery even further. And, as demonstrated in Judge Shira Scheindlin's scathing opinion against litigants' e-discovery methods in *Pension Committee of University of Montreal Pension Plan v. Banc of America Securities, LLC*,[1] courts expect litigants to preserve their electronically stored information ("ESI") and are willing to impose harsh penalties for a party's failure to meet its duties. Given this landscape, Chief Judge James F. Holderman of the United States District Court for the Northern District of Illinois directed the Seventh Circuit Electronic Discovery Committee to develop and implement principles to facilitate more focused and less costly discovery of ESI. In September 2009, the Committee released its Principles Relating to the Discovery of Electronically Stored Information ("Principles").[2]

The Principles provide guidelines to encourage cooperation between parties and ensure the proportionality of electronic discovery sought.[3] To this end, the Principles require that such requests are "targeted, clear, and specific as practicable."[4] Overall, the Principles promote targeted and effective electronic production, and help parties work through the most common issues and

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[1] 2010 WL 184312 (S.D.N.Y. Jan. 15,2010) (recognizing a party's duty to preserve ESI and endorsing penalties for failing to satisfy such duty as including cost shifting, fines, special jury instructions, and default judgment).

[2] The Principles can be found online at http://www.7thcircuitbar.org/associations/1507/files/Statement%20-%20Phase%20One.pdf.

[3] Principles 1.02 and 1.03.

[4] Principle 1.03.

disputes that arise in e-discovery at an early stage. As the Committee recognized in its October 2009 "Statement of Purpose and Preparation of Principles":

> The goal of the Principles is to incentivize early and informal information exchange on commonly encountered issues relating to evidence preservation and discovery, paper and electronic, as required by Rule 26(f)(2). Too often these exchanges begin with unhelpful demands for the preservation of all data, which often are followed by exhaustive lists of types of storage devices. Such generic demands lead to generic objections that similarly fail to identify specific issues concerning evidence preservation and discovery that could productively be discussed and resolved early in the case by agreement or order of the court. As a result, the parties often fail to focus on identifying specific sources of evidence that are likely to be sought in discovery but that may be problematic or unduly burdensome or costly to preserve or produce. . . . The Principles are intended not just to call for cooperation but to incentivize cooperative exchange of information on evidence preservation and discovery. They do so by providing guidance on preservation and discovery issues that commonly arise and by requiring that such issues be discussed and resolved early either by agreement, if possible, or by promptly raising them with the court.[5]

In cases that require discovery of ESI, Principle 2.01 provides a helpful list of topics that parties should discuss before the Fed. R .Civ. P. 16 discovery conference. For instance, parties should identify relevant ESI, the scope of ESI preservation, the format of preservation and production of ESI, the potential for conducting discovery in stages, and procedures for handling inadvertent production of privileged information and other potential waiver issues. When e-discovery disputes arise, each party must appoint an e-discovery liaison, a person who is knowledgeable on her side's retention policies and capabilities.[6] In a February 2010 webinar discussing the Principles, Chief Judge Holderman and Magistrate Judge Nan Nolan explained that they expect these liaisons to be able to educate judges on the technical underpinnings of these disputes so that courts may resolve them quickly and effectively.

Although e-discovery guidelines have been devised in other jurisdictions, the Principles have been implemented in actual federal court cases in the Northern District of Illinois. The Committee has instituted a "Pilot Program," Phase One of which commenced in October 2009 and runs through May 2010, allowing judges and litigants to apply the Principles in selected cases by adopting the Committee's proposed standing order for e-discovery practice. Over 81 cases have adopted the standing order since October 2009. That the litigants in these cases have not filed a single

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[5] See the Committee's "Statement of Purpose and Preparation of Principles" at page 9 of the October 2009 version of the Principles.

[6] Principle 2.02.

discovery-related motion is an early indication of the Principles' effectiveness at reducing discovery disputes.[7]

Once Phase One concludes in May 2010, the Committee will evaluate the results by issuing questionnaires to the participating judges and litigants. The Committee will use this information to appraise the efficacy of the Principles and refine them further. In May 2011, the Committee plans to issue its final Principles. During the February 2010 webinar, Chief Judge Holderman expressed his hope that the Principles will be adopted on a national level thereafter.

The Principles reflect the recognition among lawyers, judges, and litigants of the pitfalls and potentially exorbitant costs of electronic discovery. These guidelines seek to preclude such problems by requiring focused preservation and production of ESI. Increasingly, parties involved in litigation and their counsel must be mindful of the costs of e-discovery, the duties it creates, and the severe sanctions for non-compliance. These parties and their counsel must ensure that they conduct data preservation and e-discovery efficiently and within the requirements of ever-changing rules.

* * *

Ashly Iacullo and Ian J. Block are attorneys with Pattishall, McAuliffe, Newbury, Hilliard & Geraldson LLP, a leading intellectual property law firm based in Chicago, Illinois. Pattishall McAuliffe represents both plaintiffs and defendants in trademark, copyright, and unfair competition trials and appeals, and advises its clients on a broad range of domestic and international intellectual property matters, including brand protection, Internet, and e-commerce issues. Ashly's practice focuses on litigation and counseling on domestic and international trademark, trade dress, Internet, and copyright law. Ian's practice focuses on domestic and international trademark, Internet, e-commerce, and copyright law.

[7] It remains to be seen whether this initial success and cooperation can persist generally to all cases. Although the Principles' record to date certainly is impressive, the cases selected for inclusion in the Pilot Program may not be a representative sample of all cases requiring e-discovery, especially considering that parties that agree with each other and the court to implement the Principles at the outset of litigation likely are less prone to acrimony than the broader universe of all litigants.

ChicagoLawyer

Changing the culture of e-discovery

April 06, 2010

By Melissa Birks

In a week of back-and-forth between both sides of the case, the e-discovery bill ran up to nearly $85,000. And that was to resolve a minor issue, a niggling point about how the client notified witnesses that they had to save certain documents in advance of a lawsuit.

"They just didn't do it quite right; they didn't have a real solid process," recalled Alon Israely, senior e-discovery adviser at BIA, a New York-based digital discovery services vendor that worked on the case. "It wasn't a big deal. We didn't even have any hearings. But even in only a week, it quickly got up to around $85,000. In retrospect, when we analyzed it afterwards, if they were to put $35,000 worth of fixes to their notification system, it would have been about $5,000 of lawyering and two little letters and nipped the issue in the bud."

To some, of course, e-discovery can seem less like a bud to be nipped and more like a monster to be slain. But, even as e-discovery costs can explode beyond anyone's control, efforts are under way to understand and control this phenomenon.

As one guest at a recent seminar put on by the Federal Bar Association in Chicago said, the cost of e-discovery can rapidly eclipse the budget of many small countries. The amount of e-data can consume a terabyte of computer space. "I'm not sure what that means," the same guest said, "but it sounds really big." It is. One terabyte is equal to 1 trillion bytes.

Further, recent court rulings have made it clear that, in this era, companies must adequately preserve all documents that could be relevant to a lawsuit. In January, the same judge from the Southern District of New York who ruled in the series of seminal e-discovery cases, *Zubulake v UBS Warburg* , 217 FRD 309 and 220 FRD 212 (S.D.N.Y. 2003), went even further. In *Pension Committee of the Univ. of Montreal Pension Plan v. Banc of Am. Securities* ., No. 05-9016 (S.D.N.Y. Jan. 15, 2010), Judge Judith Scheindlin determined that parties could be sanctioned if they are negligent in how they wrangle e- discovery.

Negligence could be, among other problems, a party's failure to issue a written litigation hold (the document that tells the other party what documents must be preserved); a party's failure to

stop automatically deleting e-mail; or the delegation of e-discovery obligations to inexperienced employees.

The 7th Circuit Electronic Discovery Pilot Program, the nation's only pilot program with principles being adopted, followed and tested, intends to tame e-discovery. Now in its first phase, the program was developed by a committee of about 40 lawyers, judges, in-house counsel and government attorneys. Its goal is to promote "early and informal" exchange of e-discovery. Its principles put a premium on cooperation, not just to make the process smoother but, in doing so, to actually reduce the costs of e-discovery.

"The problem with e-discovery is we so rarely get to the communication. Even though it looks like a monster, so big and so expensive, I think this is going to help in the end to break through a lot of communication barriers," U.S. Magistrate Judge Nan R. Nolan, who chairs the pilot program, told the seminar audience. "We're struggling with this. It's an old culture. We can no longer put up with the culture because of the cost, and the thing is, when we're suggesting cooperation, in this recession, I am sure you are hearing from your clients that we can no longer afford this."

About 80 cases are now working under the pilot program; participating judges and lawyers will be surveyed this spring. In May, the committee will evaluate the surveys and refine the principles, if necessary, and the second phase begins in June. In May 2011, the committee will formally present its findings and issue the final principles.

The pilot program is not about eliminating e-discovery motions, said committee member Thomas A. Lidbury, a partner at Mayer Brown who co-chairs the firm's Electronic Discovery and Records Management practice.

"The idea," he said, "is to get e-discovery under control, to get people discussing things to get it under control early on, and keeping costs down to a reasonable level."

Feet to the fire

It's easy to see how e-discovery can become a financial, logistical and legal juggernaut.

"It's an issue that is going to continue to grow. Volumes of electronic data are growing exponentially, in good times or bad, regardless of the economy," said Regina Jytyla, managing staff attorney at Kroll Ontrack, an e-discovery vendor based in Minneapolis. "Corporations and litigants are going to have to position themselves so that they can cost-efficiently and defensibly respond to litigation despite the growing reams of data."

Jytyla points to significant rulings, such as *Pension* , as a reason why corporations and law firms must take notice of e-discovery.

"Judges are becoming learned in this topic," she said, "and they are holding feet to the fire."

"In the *Pension* decision, for instance, Jytyla explained that the judge "makes it clear that failing to issue a written hold that identifies all the key players constitutes gross negligence. This case highlights how important it is that corporations position themselves to defensibly and cost-effectively respond to requests for ESI [electronically stored information] - before the summons and complaint is served. One way to do that is through an archiving system that has a robust legal hold

capability and requiring that employees comply with document retention and legal hold protocol. Ignorance is no longer an excuse."

With that in mind, corporations face daunting questions on how to manage e-discovery even before a lawsuit is ever filed. Keep it in-house? Outsource? What kind of vendor should be tapped, and what kind of technology is appropriate? Once lawyers become involved, they must become familiar with their client's technological warehouse - or find someone who is.

"My prediction is that *not* using advanced technology to both find all of the information and preserve it is not going to be viewed positively by the justice system," said Neil Araujo, CEO of Autonomy iManage in Chicago, which has about 1,500 law firm clients.

At the same time, that case law is changing and programs like the 7th Circuit pilot are trying to control e-discovery, Araujo noted, "The amount of data is expanding exponentially. And it's different data: video, audio and in multiple languages. There is increased complexity."

Israely, of BIA, explained that corporations have tandem concerns: Keeping e-discovery costs reasonable and having "defensible" practices that will stand up in court.

In this recession, when corporations are looking for places to cut back, BIA sees a trend in how e-discovery is managed. Where in the past a law firm would hire an e-discovery vendor on behalf of a corporate client, now corporations are hiring such vendors in the same way they would hire providers of other services. BIA's client base is about 75 percent corporate and 25 percent law firms, including Winston & Strawn.

"If you look at what's happened over the last year, I think you'll find a substantial increase in corporations reining in, taking control of the selection process that are providing their e-discovery providers," Israely said.

In taking control, the corporation's goal is to send fewer documents to lawyers trying a case. The fewer documents, the cheaper e-discovery will be. At BIA, Israely estimates the average cost of collecting and processing at $1 per document; the cost of an attorney's review, an average of $3 per document.

"If a corporation is not doing it efficiently, doesn't have the tools to do it efficiently, they may be sifting through documents that are not relevant. They have to have a compelling cost argument. They have to show good ROI," Israely said, referring to the return on investment. "The cost-effective way, the best way to do that: less lawyering time spent on mundane, basic activities. I'm not saying less lawyering spent on the important stuff. I'm saying less on sifting through non-relevant documents. To lower the cost in getting documents to the attorneys' eyes - those two things: less time reviewing unnecessary documents and less time gathering and processing those documents."

He recalled a situation where BIA was able to eradicate 8 percent of potentially discoverable documents in a contract dispute case. The irrelevant documents turned out to be cafeteria menus. The software identified and tossed out the fatty menus before the attorneys became involved, saving the client thousands of dollars.

"Some companies outsource everything to an e-discovery vendor that comes in and collects and processes data before that data is provided to the outside counsel. We usually collect everything in-house. After we collect everything, we provide it to outside counsel, or in a huge case, to a third-

party processor," said Pauline Levy, senior counsel on the legal litigation team of McDonald's legal department and a member of the 7th Circuit Electronic Discovery Pilot Program Committee. "Fortunately for us, in my group, most matters are not enormous, maybe 10 to 12 witnesses."

That bytes

Ten to 12 witnesses is on the smaller end of the spectrum.

Consider that one gigabyte of space on a hard drive can store 70,000 e-mails that can span months or even years. One terabyte can store the equivalent of 1,000 gigabytes. To give a sense of scale, one terabyte can hold as much data as would fit on 1,535 CDs, according to the Library of Congress (which has 160 terabytes of online archived data). If those 1,535 CDs were stacked, they would reach about 7 feet tall.

It's not uncommon for Lidbury to be confronted with managing a terabyte of e-documents.

Recovering a terabyte of data could cost around $1 million, he estimated, "before anybody even looks at it." And that's the good news. In years past, he said, that cost could have been as high as $2.5 million.

Lidbury approaches the issue of cost with a measured attitude: Yes, e-discovery is expensive. But it is getting cheaper all the time.

"It's a market of expanding capability and decreasing cost. It's still expensive, but it's getting cheaper," he said.

Lidbury likes software that uses "concept clustering" based on complex statistical models to take raw data and organize it into topical "buckets." When it comes time to collect relevant data, the "garbage" is flagged and tossed aside.

"Five years ago, I wouldn't have been able to use a tool like this in 10 percent of my matters. It wasn't cost-effective. Now, more and more I can use it in most of my cases. The point is, I can use it in way more cases, and now it's cost-effective," Lidbury said.

Araujo, of Autonomy, said the two main methods of cutting costs, through technology, are by reducing the "noise" - irrelevant data, like cafeteria menus or duplicate documents - and by shortening the e-discovery "supply chain." That means that corporate clients are increasingly using technology that allows the law firm to access the data directly, cutting out the third party.

"If you can reduce the amount of data by up to 90 percent, and we've seen that happen, you reduce the e-discovery costs by 90 percent. Statistics show that the average per-page cost is about $3, for the full process," Araujo said. "Let's say you have 1 million pages. You go from 3 million to 10 percent of that, which is 30,000. Another example is when reviewing audio, using advanced technology like ours, you don't have to listen to every single bit of audio and transcribe it. You can search audio just like searching text. And that, too, reduces somewhat the time it takes to review audio, 80 to 90 percent."

Jytyla, of Kroll Ontrack, described early case assessment and analytic tools that can visually show e-mail chains of "who is talking to whom," which could bring to light a possible witness who hadn't been considered before.

"People use it to control costs. Analytic technology is a great way to winnow down data and spotlight the custodians who are most relevant to a matter," Jytyla said, adding that the cost of such tools is "all over the board; there really isn't any industry standard."

Levy recalled a large multi-district litigation in which McDonald's spent about $700,000 on an outside vendor for data collection, a price tag that did not include an estimated $1 million for the legal review of the documents.

"That's not typical for us, thank God. That is typical for big disputes where e-discovery is involved. I do think the pilot program might have helped in this multi-district matter. If we could have agreed on search terms, key witnesses, that alone might have reduced costs," Levy said.

Talking it out

Indeed, technology is just one way to control costs of e-discovery, according to Levy and others in the 7th Circuit pilot program.

The program's principles require early and in-depth conversations among parties, with the goal that neither side has to raid the corporate bank account. One cost-driver, for instance, can come early in a case, when one side sends a "preservation letter" to the other, demanding that every possible byte of data be saved.

"Are you nuts?" the other side might respond. As the issue drags on, both sides waiting for a judge's opinion, the costs mount. Or, the other side might try to comply. And the costs mount.

One principle reads: "Vague and overly broad preservation orders should not be sought or entered."

"We're hoping to end the practice of just demanding everything, terabytes of data that nobody's going to look at but is being used as a torture weapon," Lidbury said. "It doesn't happen much when the case is between two big companies; it would cause mutual destruction. But in an asymmetrical case, where one has nothing of relevance and the other has massive amounts . there does need to be some balance."

Levy, of McDonald's, described the worst preservation letters as "scare tactics."

"They're ridiculous. They would list everything under the sun. The helpful thing for this [principle] is it puts parameters for in-house counsel: 'This is the information we'd like you to keep.' That will help me look at my legal hold and make sure I have the witnesses I think are relevant," she said.

Another principle says that, before initiating discovery, the parties must discuss the specific need for the data and suitable alternative means for getting that information. The parties should come to this "meet-and-confer" conference prepared to discuss specific issues, a time frame, potential damages and targeted discovery that each side anticipates requesting.

That principle also lists data that are typically not electronically discoverable. If one side still wants such information (for instance, random access memory or other ephemeral data), then that discussion must happen as soon as possible.

"It gives you the duty to say so and bring it up," Lidbury said. "If there's a dispute of what should be done, it should be resolved in the beginning of the case, rather than the parties sticking their heads in the sand and, well, if it comes up a year later, we'll ask. It discourages the tactic of coming into a dispute, sitting on it and waiting for the judge to sort it out a year later."

The principles encourage lawyers to voice concerns about e-discovery to a judge, Lidbury said. Too often, he said, lawyers who may not be technologically savvy are afraid to simply ask a judge to help make an e-discovery request reasonable.

"If you engage and exchange information and are not afraid to ask a judge . I think you can bring down costs. I don't think a judge is going to order you to do a million dollars in discovery on a $50,000 case," he said.

The principles also call for a unique method of ensuring that a judge understands e-discovery issues. Each party must designate a third party, called an "e-discovery liaison," who attends court hearings to respond to questions and clarify issues that may arise. The liaison may be another lawyer, an information technology expert, or a third-party consultant. Regardless of that person's title, he or she must be knowledgeable about e-discovery efforts and be able to explain and answer questions about electronic systems.

"If there's an e-discovery motion," Lidbury said, "you have to have someone who qualifies as a liaison."

U.S. District Judge Virginia M. Kendall, who moderated the recent seminar, said she believes these practices can lower e-discovery costs.

"There's no question that communicating with a trained expert can definitely refine searches and lower costs," Kendall said.

Nolan sees reason for optimism. Since the pilot began in October 2009, she has presided over 15 cases in the program. As of February, she had yet to rule on one e-discovery-related motion.

That means, she said, "they're talking it out."

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In This Issue
Experience

The Seventh Circuit's E-Discovery Pilot Program

By Laura D. Cullison

The complexities surrounding the discovery of electronically stored information (ESI) have, at times, confounded courts, counsel, and clients. Various efforts are underway to help all through the unique and challenging issues addressing the disclosure, discovery, and use of ESI in litigation. The Seventh Circuit Court of Appeals has stepped into this dialogue by recently launching an Electronic Discovery Pilot Program. This program signals the judiciary's interest in finding practical ways to change the adversarial assumptions litigators bring to the discovery process. A review of this ongoing experiment provides insight into the changing nature of the discovery of ESI and the resulting shift in many litigators' approach to the discovery process.

The Seventh Circuit Electronic Discovery Committee leads the Seventh Circuit's Pilot Program. This committee, originally instituted by Chief Judge James Holderman and chaired by Magistrate Judge Nan Nolan, began as a group of experts and lawyers working with the U.S. District Court for the Northern District of Illinois on the topic of electronic discovery. The committee quickly expanded as support grew among members of the legal community in the geographic area of the Seventh Circuit. The Seventh Circuit Bar Association liaison representatives became members of the committee. Members of the Civil Practice Section and the Federal Civil Practice Section of the

Illinois State Bar Association also joined the committee. Other bar associations, including the Chicago Bar Association and the Federal Bar Association-Chicago Chapter, also provided their support to the committee.

One of the strengths of the pilot program is that the committee members bring different perspectives to the process. The committee includes private practitioners from a broad spectrum of the bar (plaintiff, defense, and government) who are leaders in the area of electronic discovery. The committee also includes technical experts who regularly collect and process ESI, and in-house counsel at companies that regularly face the challenges of discovery of ESI in organizations with large and complex systems. As of October 2009, the committee consisted of more than 40 members.

At its initial meeting in May 2009, committee members discussed and identified goals to follow in drafting a set of proposed principles for electronic discovery, including considering what can be done to reduce the costs of electronic discovery as well as the costs of discovery and litigation more generally. The committee members identified three major areas of focus and formed three corresponding subcommittees: (1) Preservation, (2) Early Case Assessment, and (3) Education. From May through September 2009, the subcommittees met and robustly (and at times heatedly) debated issues regarding the discovery of ESI. Based on those discussions, the full committee produced the Pilot Program's Principles Relating to the Discovery of ESI, which are set forth below. As expressly stated in their purpose, the principles are designed to "promote, whenever possible, the early resolution of disputes regarding the discovery of ESI ('ESI') without Court intervention."

The Principles

The principles are based on two cornerstone standards: cooperation and proportionality. The call for cooperation in the pretrial electronic discovery process is not new, but was first widely proclaimed in the Sedona Conference Corporation Proclamation. The difficult part is translating this call for cooperation into actual, tangible changes in the way lawyers proceed with discovery. The principles address this gap first by making clear that cooperation between opposing counsel is not the exception, but the rule. The cooperative exchange of information on evidence preservation and electronic discovery is presumed, as reflected in Principle 1.02:

> An attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

When drafting discovery requests, zealous representation often is read to mean drafting a request to ask for everything that could possibly lead to relevant information in the broadest manner possible. The idea of "reasonable limitations" is antithetical to the idea that discovery requests should be as broad as possible to maximize the chance of obtaining helpful information from the opposing side. Principle 1.02 takes that assumption and turns it on its head by pointing out that overbroad discovery requests can actually harm a client's interest by raising costs and increasing the risk of sanctions.

One of the strengths of the program is that the committee members bring different perspectives.

Principle 1.03 emphasizes proportionality, an often overlooked cornerstone of discovery. Proportionality has long been a part of the Federal Rules. However, in the context of electronic discovery, it can be a difficult concept to evaluate. Principle 1.03 tries to address the difficulty by requiring that discovery requests and responses be targeted, clear, and specific.

Within the complementary standards of cooperation and proportionality, the principles call for early case assessment, specific identification of likely sources of relevant ESI, and early identification of disputes concerning such discovery. In other words, the principles require that attorneys know the facts of their case, what they need to prove at trial, and what specific facts are in dispute, early on in the case.

The principles also address numerous practical details related to ESI in a direct and clear manner. Principle 2.02 generally encourages the use of an "e-discovery liaison" with specific knowledge of the electronic discovery matters in the case and requires the use of a liaison if a dispute arises. This liaison can be in-house counsel, outside counsel, a third-party consultant, or an employee of the party. Principle 2.03 provides clear guidance on how to draft an appropriate preservation request. This principle makes clear that simply substituting a new case title onto the same old generic preservation request will not suffice. Principle 2.03 also identifies categories of ESI that "generally are not discoverable in most cases" including "'deleted,' 'slack,' 'fragmented' or 'unallocated' data on hard drives." Principal 2.06 discusses production format, an important but often overlooked item in the early stages of a case.

The Results

Many organizations have created useful guidance and principles for electronic discovery. What makes the committee's contribution in this area unique is that the principles are being tested and evaluated during the Pilot Program. Individual district-court judges, magistrate judges, and bankruptcy judges in the Seventh Circuit voluntarily have adopted the

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Principles Relating to the Discovery of Electronically Stored Information

Seventh Circuit Electronic Discovery Pilot Program (Phase One October 1, 2009 to May 1, 2010)

General Principles

Principle 1.01 (Purpose)

The purpose of these Principles is to assist courts in the administration of Federal Rule of Civil Procedure I, to secure the just, speedy, and inexpensive determination of every civil case, and to promote, whenever possible, the early resolution of disputes regarding the discovery of electronically stored information ("ESI") without Court intervention. Understanding of the feasibility, reasonableness, costs, and benefits of various aspects of electronic discovery will inevitably evolve as judges, attorneys and parties to litigation gain more experience with ESI and as technology advances.

Principle 1.02 (Cooperation)

An attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

Principle 1.03 (Discovery Proportionality)

The proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C) should be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable.

Early Case Assessment Principles

Principle 2.01 (Duty to Meet and Confer on Discovery and to Identify Disputes for Early Resolution)

(a) Prior to the initial status conference with the Court, counsel shall meet and discuss the application of the discovery process set forth in the Federal Rules of Civil Procedure and these Principles to their specific case. Among the issues to he considered for discussion are:

(1) the identification of relevant and discoverable ESI;

(2) the scope of discoverable ESI to be preserved by the parties;

(3) the formats for preservation and production of ESI;

(4) the potential for conducting discovery in phases or stages as a method for reducing costs and burden; and

(5) the procedures for handling inadvertent production of privileged information and other privilege waiver issues under Rule 502 of the Federal Rules of Evidence.

(b) Disputes regarding ESI that counsel for the parties are unable to resolve shall be presented to the Court at the initial status conference, Fed. R. Civ. P. 16(b) Scheduling Conference, or as soon as possible thereafter.

(c) Disputes regarding ESI will be resolved more efficiently if, before meeting with opposing counsel, the attorneys for each party review and understand how their client's data is stored and retrieved in order to determine what issues must be addressed during the meet and confer discussions.

(d) If the Court determines that any counsel or party in a case has failed to cooperate and participate in good faith in the meet and confer process or is impeding the purpose of these Principles, the Court may require additional discussions prior to the commencement of discovery, and may impose sanctions, if appropriate.

Principle 2.02 (E-Discovery Liaison(s))

In most cases, the meet and confer process will be aided by participation of an e-discovery liaison(s) as defined in this Principle. In the event of a dispute concerning the preservation or production of ESI each party shall designate an individual(s) to act as e-discovery liaison(s) for purposes of meeting, conferring, and attending court hearings on the subject Regardless of whether the e-discovery liaison(s) is an attorney (in-house or outside counsel), a third party consultant, or an employee of the party, the e-discovery liaison(s) must:

(a) be prepared to participate in e-discovery dispute resolution;

(b) be knowledgeable about the party's e-discovery efforts;

(c) be, or have reasonable access to those who are, familiar with the party's electronic systems and capabilities in order to explain those systems and answer relevant questions; and

(d) be, or have reasonable access to those who are, knowledgeable about the technical aspects of e-discovery, including electronic document storage, organization, and format issues, and relevant information retrieval technology, including search methodology.

Principle 2.03 (Preservation Requests and Orders)

(a) Appropriate preservation requests and preservation orders further the goals of these Principles. Vague and overly broad preservation requests do not further the goals of these Principles and we therefore disfavored. Vague and overly broad preservation orders should not be sought or entered. The information sought to be preserved through the use of a preservation letter request or order should be reasonable in scope and mindful of the factors set forth in Rule 26(b)(2)(C).

(b) To the extent counsel or a party requests presentation of

ESI through the use of a preservation letter, such requests should attempt to ensure the preservation of relevant and discoverable information and to facilitate cooperation between requesting and receiving counsel and parties by transmitting specific and useful information. Examples of such specific and useful information include, but are not limited to:

(1) names of the parties;
(2) factual background of the potential legal claim(s) and identification of potential cause(s) of action;
(3) names of potential witnesses and other people reasonably anticipated to have relevant evidence;
(4) relevant time period; and
(5) other information that may assist the responding party in assessing what information to preserve.

(c) If the recipient of a preservation request chooses to respond, that response should provide the requesting counsel or party with useful information regarding the preservation efforts undertaken by the responding party. Examples of such useful and specific information include, but are not limited to, information that:

(1) identifies what information the responding party is willing to preserve and the steps being taken in response to the preservation letter;
(2) identifies any disagreement(s) with the request to preserve; and
(3) identifies any further preservation issues that were not raised.

(d) Nothing in these Principles shall be construed as requiring the sending of a preservation request or requiring the sending of a response to such a request.

Principle 2.04 (Scope of Preservation)

(a) Every party to litigation and its counsel is responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control. Determining which steps are reasonable and proportionate in particular litigation is a tact specific inquiry that will vary from case to case. The parties and counsel should address preservation issues at the outset of a case, and should continue to address them as the case progresses and their understanding of the issues and the facts improves.

(b) Discovery concerning the preservation and collection efforts of another party may be appropriate but, if used unadvisedly, can also contribute to the unnecessary expense and delay and may inappropriately implicate work product and attorney-client privileged matter. Accordingly, prior to initiating such discovery a party shall confer with the party from whom the information is sought concerning: (i) the specific need for such discovery, including its relevance to issues likely to arise in the litigation; and (ii) the suitability of alternative means for obtaining the information. Nothing herein exempts deponents on merits issues from answering questions concerning the preservation and collection of their documents, ESI, and tangible things.

(c) The parties and counsel should come to the meet and confer conference prepared to discuss the claims and defenses in the case including specific issues, time frame, potential damages, and targeted discovery that each anticipates requesting. In addition, the parties and counsel should be prepared to discuss reasonably foreseeable preservation issues that relate directly to the information that the other party is seeking. The parties and counsel need not raise every conceivable issue that may arise concerning its preservation efforts; however, the identification of any such preservation issues should be specific.

(d) The following categories of ESI generally are not discoverable in most cases, and if any party intends to request the preservation or production of these categories, then that intention should be discussed at the meet and confer or as soon thereafter as practicable:

(1) "deleted," "slack," "fragmented," or "unallocated" data on hard drives;
(2) random access memory (RAM) or other ephemeral data;
(3) on-line access data such as temporary internet files, history, cache, cookies, etc.;
(4) data in metadata fields that are frequently updated

principles and have implemented them in selected cases. Each participating judge has entered a standing order in the selected cases, incorporating the principles into the case-management requirements. Pursuant to the standing order, the principles serve as supplemental procedural guidelines to be followed by litigants. The parties and counsel are obligated to handle electronic discovery in the manner set forth in the Principles.

Phase One of the Pilot Project runs from October 2009 to May 2010. To help evaluate the results of Phase One for the cases subject to the principles, the Institute for the Advancement of the American Legal System (IAALS) at the University of Denver is developing questionnaires. Participating judges and lawyers from the Pilot Program will complete the questionnaires. The committee will present the results of the IAALS's questionnaires at the Seventh Circuit Bar Association Annual Meeting in May 2010. The committee also will utilize the results to further refine the principles. In May 2011, the committee will formally present its findings and issue its final principles.

automatically,, such as last-opened dates; and

(5) backup data that is substantially duplicative of data that is more accessible elsewhere;

(6) other forms of ESI whose preservation requires extraordinary affirmative measures that are not utilized in the ordinary course of business.

(e) If there is a dispute concerning the scope of a party's preservation efforts, the parties or their counsel must meet and confer and fully explain their reasons for having that additional efforts are, or are not, reasonable and proportionate, pursuant to Rule 26(b)(2)(C). If the parties are unable to resolve a preservation issue, then the issue should be raised promptly with the Court.

Principle 2.05 (Identification of ESI)

(a) At the Rule 26(f) conference or as soon thereafter as possible, counsel or the parties shall discuss potential methodologies for identifying ESI for production.

(b) Topics for discussion may include, but are not limited to, any plans to:

(1) eliminate duplicative ESI and whether such elimination will occur only within each particular custodian's data set or whether it will occur across all custodians;

(2) litter data based on file type, date ranges, sender, receiver, custodian, search terms, or other similar parameters; and

(3) use keyword searching mathematical or thesaurus-based topic or concept clustering or other advanced culling technologies.

Principle 2.06 (Production Format)

(a) At the Rule 26(f) conference, counsel or the parties should make a good faith effort to agree on the format(s) for production of ESI (whether native or some other reasonably usable form). If counsel or the parties are unable to resolve a production format issue, then the issue should be raised promptly with the Court.

(b) ESI stored in a database or a database management system often can be produced by querying the database for discoverable information, resulting in a report or a reasonably usable and exportable electronic file for review by the requesting counsel or party.

(c) ESI and other tangible or hard copy documents that are not text-searchable need not be made text-searchable.

(d) Generally, the requesting party is responsible for the incremental cost of creating its copy of requested information. Counsel or the parties are encouraged to discuss cost sharing for optical character recognition (OCR) or other upgrades of paper documents or non-text-searchable electronic images that may be contemplated by each party.

Education Principles

Principle 3.01

Because discovery of ESI is being sought more frequently in civil litigation and the production and review of ESI can involve greater expense than discovery of paper documents, it is in the interest of justice that all judges, counsel and parties to litigation become familiar with the fundamentals of discovery of ESI. It is expected by the judges adopting the Principles that all counsel will have done the following in connection with each litigation matter in which they file an appearance:

(1) Familiarize themselves with the electronic discovery provisions of Federal Rules of Civil Procedure, including Rules 26, 33, 34, 37, and 45, as well as any applicable State Rules of Procedure;

(2) Familiarize themselves with the Advisory Committee Report on the 2006 Amendments to the Federal Rules of Civil Procedure, available at http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf; and

(3) Familiarize themselves with these Principles.

Principle 3.02

Judges, attorneys and parties to litigation should also consult The Sedona Conference® publications relating to electronic discovery, additional materials available on web sites of the courts, and of other organizations providing educational information regarding the discovery of ESI.

The current Pilot Program principles provide valuable guidance to any practitioner anywhere on the most common issues in electronic discovery, and provide a framework for cooperation that can reduce discovery costs, risk, and uncertainty. With the benefit of the Seventh Circuit's unique Pilot Program, the final principles should be even better. Hopefully, this experiment in the Seventh Circuit will benefit any litigator wanting to zealously represent a client by conducting discovery in a cooperative manner.

Relevant Websites

www.theested.conference.org/content/miscFiles/publications_html?grp**wgs110; www.ilnd.uscourts.gov/home; www.7thcircuitbar.org www.file.gov (under Educational Program and Materials); www.du.edu/legalinstitute.

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Ethics Curbstone

*25 ELECTRONICALLY STORED INFORMATION AND SPOLIATION OF EVIDENCE

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Atrio of recent decisions puts discovery of electronically stored information ("ESI") and sanctions related to destruction of ESI back in the spotlight. Although these three cases were all in federal court, Jan. 1, 2008 amendments to Indiana Trial Rules 26 and 34 align Indiana with the corresponding Federal Rules of Civil Procedure when it comes to discovery of ESI.

Lawyers in the dock

Although the trial rules speak in terms of parties seeking discovery from other parties, we know that parties rarely engage in or respond to discovery all on their own. They are assisted by their attorneys. Lawyers have an important role to play in facilitating discovery consistent with the governing rules. In fact, the role of lawyers in the discovery process has an ethical dimension. Indiana Rule of Professional Conduct 3.4 provides in part:

> A lawyer shall not (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act; [or] (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

Southern District of Indiana U.S. District Court Judge Larry McKinney's June 2009 discovery sanction opinion in the *Red Spot Paint* case (not an ESI case) also demonstrates that a federal court, acting under its inherent authority to control proceedings, can cause discovery sanctions in the form of attorney fees and costs to be assessed against both a client and its attorneys. *1100 West, LLC v. Red Spot Paint & Varnish Co., Inc.* (U.S.D.C. S.D.Ind. June 5, 2009). In that case, Judge McKinney allocated half of the attorney fees and cost sanctions against Red Spot's attorneys and, extraordinarily, their law firm.

***Zubulake* revisited**

Three recent cases illustrate the extent to which discovery disputes over ESI impose burdens on judicial, party and attorney resources. In one of the recent cases, U.S. District Court Judge Shira A. Scheindlin noted that she and her two law clerks had collectively spent 300 hours of time just dealing with the motion for ESI discovery sanctions. *Pension Committee of the University of Montreal Pension Plan v. Bank of America Securities, LLC,* at 25 n. 56 (U.S.D.C. S.D.N.Y. Jan. 15, 2010). I think she was joking when she said that their blended hourly rate was $30 per hour - which may be factually true, but certainly not an accurate measure of value. In an era of scarce judicial resources, this is unfortunate, whatever the hourly rate.

Judge Scheindlin is best known for her comprehensive and cutting-edge opinions on discovery of ESI in the *Zubulake* cases. In fact, she actually titled her opinion in *Pension Committee, "Zubulake* Revisited: Six Years Later." The first 25 pages of her opinion are a virtual hornbook on the duty to preserve ESI and the appropriate and highly nuanced judicial response to spoliation of ESI.

She discusses the culpability standards associated with spoliation, running from negligence through gross negligence and willfulness to bad faith. She discusses the duty to preserve evidence when litigation is pending or becomes reasonably foreseeable, including the importance of counsel for a party providing adequate and written litigation hold notices to clients, and she clarifies that failure to preserve evidence under these circumstances is spoliation. She engages in a very complex discussion of the burdens of proof when determining whether there has been spoliation and the degree of culpability, and she remarks on the difficulty and importance of finding the right balance for fear of encouraging discovery misconduct on the one hand and rewarding parties to game the discovery system by attempting to leverage unfair advantage from the other side's benign or unintentional discovery violations. Finally, she discusses at great length the remedies for sanctionable discovery violations, including so-called "terminal sanctions" (entry of default judgment or dismissal), further discovery, cost-shifting, fines, preclusion of certain evidence, and giving special jury instructions.

Judge Scheindlin ended up finding gross negligence on the part of some of the parties and ruled that it warranted a special jury instruction on spoliation that will permit the jury to infer from the spoliation that the lost evidence was relevant and would have been favorable to the innocent party. Needless to say, an award of costs and attorney fees was also a part of the sanction, even against the parties who were merely negligent.

Bad faith required

A second recent case dealing largely with the same topic, but unlike *Pension Committee,* finding bad faith on the part of the culpable parties, is *Rimkus Consulting Group, Inc. v. Cammarata,* (U.S.D.C. S.D.Tex. Feb. 19, 2010). That decision, by U.S. District Judge Lee H. Rosenthal, is similarly comprehensive, cites ***26** extensively to *Pension Committee*, and teases out a distinction among the circuits over the degree of fault that is necessary to support severe sanctions (as opposed to costs, attorney fees and the like). Judge Rosenthal identified the standard in the Fifth Circuit, noted that it is in line with the standard in numerous other circuits, including the Seventh (citing *Faas v. Sears, Roebuck & Co.*, 552 F.3d 633, 644 (7th Cir. 2008)), and contrasted it with Judge Scheindlin's and the Second Circuit's standard (allowing severe sanctions on a finding of gross negligence). She determined that gross negligence was an insufficient basis for ordering severe sanctions and went on to find that bad faith was present and warranted a special jury instruction similar to that ordered by Judge Scheindlin in *Pension Committee.*

Never mind

Finally, a third case, that started out pretty scary for some lawyers, ended with a whimper instead of a bang, but not before a huge investment of lawyer and judicial time. In a long running patent infringement case between Qualcomm, Inc. and Broadcom Corp., an issue over ESI discovery compliance was referred to California U.S. Magistrate Judge Barbara L. Major. In January of 2008, she ordered more than $8 million in discovery sanctions jointly and severally against Qualcomm and a number of its outside counsel. Outside counsel had been prevented from trying to foist responsibility for the discovery failings on its own client because Qualcomm asserted the attorney-client privilege.

On objections to the order by the sanctioned lawyers, U.S. District Court Judge Rudi M. Brewster (quite reasonably, in my estimation) reversed the sanctions order because the Magistrate Judge failed to recognize the self-defense exception to the attorney-client privilege. This impaired the ability of the sanctioned lawyers to defend themselves to such a degree that it violated their due process rights. Judge Brewster remanded the matter to the Magistrate Judge for further proceedings. In the ensuing 15 months, a massive effort was undertaken to demonstrate that the discovery problems were the fault of the client, not its attorneys.

On April 2, Magistrate Judge Major issued a new order declining to sanction the attorneys, concluding that even though a number of the attorneys made "significant errors" in conducting discovery, they did not act with the requisite bad faith required for the court to exercise its inherent authority to order monetary sanctions against them. As to the sole Qualcomm attorney who had the misfortune of signing the discovery under F.R.Civ.P. 26(g)(1), the Magistrate Judge found that he had not failed to make "reasonable inquiry" before certifying Qualcomm's discovery responses.

7th Circuit developments on e-discovery

On Oct. 1, 2009, the Seventh Circuit **Electronic Discovery** Committee, a committee initially conceived by the Chief Judge of the U.S. District Court for the Northern District of Illinois, James F. **Holderman**, and broadly supported by other groups, including the Seventh Circuit Bar Association, issued a report setting forth an e-discovery pilot program for the Seventh Circuit. Phase one of the pilot program was to run from Oct. 1, 2009 to May 1, 2010, after which the experience under the pilot program will be evaluated and a second phase lasting for another year will be developed.

The first phase sets forth various principles relating to discovery of ESI, including a statement of general purpose to assist "courts in the administration of Federal Rule of Civil Procedure 1, to secure the just, speedy, and inexpensive determination of every civil case, and to ***27** promote, whenever possible, the early resolution of disputes regarding the discovery of electronically stored information ("ESI") without Court intervention. Understanding of the feasibility, reasonableness, costs, and benefits of various aspects of **electronic discovery** will inevitably evolve as judges, attorneys, and parties to litigation gain more experience with ESI and as technology advances." The pilot program report is available at: *www.ilcd.uscourts.gov/Statement%20-%20Phase%20One.pdf*

Conclusion

Here are some observations from an e-discovery dilettante:

(1) Just the three cases I have discussed in this column (four if you add *Red Spot*) account for a staggering investment of attorney and judicial resources devoted to cleaning up the messes left behind when e-discovery is not conducted competently and in good faith.

(2) It is no longer amateur hour. It is way too late in the day for lawyers to expect to catch a break on e-discovery compliance because it is technically complex and resource-demanding. If you get involved in a case involving e-discovery, associate with counsel who has been down that road before and learn how it works for the first time using a safety net.

(3) As unseemly as it is to see clients and their lawyers point fingers at each other over responsibility for e-discovery lapses, in the end, it will often be necessary. *Qualcomm* illustrates the bad things that can happen to lawyers when they are initially tarred with the same brush as their clients. It also illustrates the importance of lawyers taking a thoroughly documented leadership role in directing client compliance with the often-rigorous demands of e-discovery.

53-MAY Res Gestae 25

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Federal Pilot Program Curbs E-Discovery Fights

Leigh Jones

The National Law Journal

05-14-2010

The results of the first phase of a closely watched federal court pilot program on electronic discovery show that having a set of fair-play rules at the outset of a case helps quell pretrial brawls between parties.

The goal of the program, launched in May 2009 and spearheaded by James Holderman, chief judge of the Northern District of Illinois, was to find ways to reduce the massive costs and burdens of electronic discovery. Chairing the program is Magistrate Judge Jan Nolan, also of the Northern District of Illinois.

The first-phase of the 7th Circuit's pilot program indicated that when judges and attorneys had a set of specific principles to guide electronic discovery, it improved the process -- or, at least, didn't make it worse.

"It was very encouraging," said Holderman.

The first phase of the program involved 13 district court judges overseeing 93 civil cases and 285 attorneys between October 2009 and March 2010. The program required the judges and attorneys to follow a set of principles, drafted by the program's committee members, during electronic discovery. Those principles called for:

- parties to recognize that cooperation with opposing counsel does not compromise zealous advocacy;
- parties to resolve electronic discovery disputes early, without court intervention;
- parties to make electronic discovery demands proportionate to the particulars of the case;
- parties to meet before an initial status conference with the judge to discuss discovery;
- when a dispute arose, each party to select a liaison attorney to deal with discovery and to attend hearings;
- parties to refrain from making overly broad preservation requests;
- parties to take reasonable steps to preserve electronically stored information;
- judges and attorneys to know the civil procedure rules pertaining to electronically stored information.

The participating judges and attorneys were sent a survey asking them to evaluate the program. All of the 13 judges and 133 of the attorneys responded.

About 90 percent of the judges thought that the principles increased or greatly increased the attorneys' familiarity with their clients' technology relating to electronic discovery. All the judges agreed or strongly agreed that the use of discovery liaisons increased the efficiency of the discovery process.

About 43 percent of the attorneys said that the principles increased or greatly increased the fairness of the discovery process. About 55 percent said the principles had no effect on the fairness, and fewer than 3 percent said it made the process less fair. About 61 percent said that the principles had no effect on their ability to resolve discovery disputes without court involvement.

Asked whether the principles affected their ability to zealously represent their clients, 74 percent said the principles had no effect while 22 percent said that the principles increased their ability to zealously represent their clients. About 4 percent indicated a negative effect.

As an attorney who typically represents clients requesting electronic discovery, Marni Willenson said she was comfortable with the goals of the pilot program.

"I don't fear these principles," said Willenson, a solo practitioner in Chicago and a member of the pilot program committee. Most important to Willenson was that the principles promoted cooperation among opposing counsel and early attention to the electronic discovery issues in a case.

Assisting in the design and administration of the survey were the Federal Judicial Center and the Institute for the Advancement of the American Legal System at the University of Denver.

The program committee is continuing to review the survey feedback and will start the second phase, which may include modifications to the principles. Holderman said he hopes that judges and attorneys outside the 7th Circuit will participate in the second phase.

Among the 285 attorneys participating in the program, about 33 percent identified themselves as representing parties requesting electronic data in cases, and about 35 percent said they represented parties who typically were asked to produce the data. About 25 percent represented both requesters and producers. About 7 percent were neither requesters nor producers.

Lawyers Weekly USA

May 19, 2010 Wednesday

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HEADLINE: 7th Circuit's Electronic Discovery Pilot Program releases results

BYLINE: Correy Stephenson

BODY:

The first phase of the 7th Circuit's Electronic Discovery Pilot Program is complete, and the program has resulted in positive feedback from both attorneys and judges. Launched in May 2009 by Chief Judge James Holderman of the U.S. District Court for the Northern District of Illinois, the program is an attempt to "develop, implement, evaluate, and improve pretrial litigation procedures that would provide fairness and justice to all parties while seeking to reduce the cost and burden of electronic discovery consistent with Rule 1 of the Federal Rules of Civil Procedure. "

During the first phase, 13 federal court judges presided over 93 civil cases between October 2009 and March 2010. The judges, and the 285 attorneys involved in the cases, followed a set of principles drafted by the pilot program's committee members.

Those principles included: recognizing that cooperation with opposing counsel does not compromise zealous advocacy; resolving electronic discovery disputes early, without court intervention; taking reasonable steps to preserve electronically stored information; making electronic discovery demands proportionate to the case; and making a good faith effort to agree on the format for production of electronically stored information.

Participating attorneys and judges evaluated the program by completing a survey, which revealed that 92 percent of the judges agreed that the principles had a positive effect on counsels' ability to resolve discovery disputes before requesting court involvement and reach agreements on how to handle the inadvertent disclosure of privileged information or work product.

In addition, almost 90 percent of the judges believed that the principles increased or greatly increased attorneys' familiarity with their clients' technology relating to e-discovery.

Forty-three percent of responding attorneys indicated that the principles increased the fairness of the discovery process; 55 percent said the principles had no effect on fairness, and less than 3 percent said the principles made the process less fair.

Almost three quarters of attorneys felt that the principles had no effect on their ability to zealously represent their clients, while 22 percent said the principles increased their ability to provide zealous representation.

The second phase of the program will begin July 1 and last until May 1, 2011, and will include courts outside the 7th Circuit.

LOAD-DATE: May 26, 2010

LITIGATION NEWS
NEWS, ANALYSIS, AND PUBLICATIONS FROM THE ABA SECTION OF LITIGATION

Civil Procedure »

Greater Efficiency in Civil Procedure

By Lorna G. Schofield

Invitations were as scarce as Superbowl tickets. As chair of the ABA Section of Litigation, I was lucky enough to snag a spot as a participant and observer at an extraordinary gathering of 180 judges, practitioners, and professors who comprise the Who's Who of civil procedure. Set in a classroom at Duke University Law School, it was a two-day civil procedure class on steroids, but with a mission—to help the Judicial Conference Advisory Committee for Civil Rules set the agenda for change to the civil justice system in the future. I came away with the sense that the system is working for most cases, but for a small group of important cases (including some of the most complex and highest stakes cases), our justice system has failed to adapt, is in danger of becoming obsolete, and needs to be fixed.

Despite the often academic quality of the conference, there were loud calls from many quarters to make litigation in the federal courts faster and cheaper. Large corporations protested that billions of dollars are spent every year on litigation costs before judgments and settlements. The general counsel of a small corporation complained that she cannot afford to litigate six-figure cases in federal court. Defense attorneys applauded the Supreme Court's recent decisions in *Twombly* and *Iqbal* to keep implausible claims out of federal court. They proposed rule changes that would curtail discovery and its costs. Plaintiffs' lawyers expressed their fear that meritorious cases will not be filed and that justice will not be done as additional hurdles are imposed that must be overcome in the filing and pursuit of claims. Plaintiffs' lawyers generally opposed rule changes because most of the proposals seemed aimed at cutting back on both cases and discovery in the federal courts. At the conference, the rules process itself became part of the tug of war that is a part of our adversarial system.

The problems identified present big challenges. It will be difficult to fashion a rule amendment that is both evenhanded and likely to make a significant difference. Once conceived, even the most

uncontroversial rule would take at least another 3 years to become law. A rule that is perceived as unfair by either side is unlikely to get off the ground. As Judge Lee Rosenthal (Southern District of Texas), head of the Judicial Conference Committee on Rules of Practice and Procedure, said, "Rule making is not for the short winded, impatient or faint hearted."

Some of the proposed solutions for more efficient litigation require something other than rule change. More active judicial management, for example, cannot be achieved simply by adopting a rule. Federal Rules of Civil Procedure 16 and 26 already provide the necessary framework for judges to shape and manage discovery to achieve efficiencies. Yet they are not fully utilized. A seismic shift in attitudes and knowledge (e.g., about electronic discovery) of the bench and bar will be essential. All of this change, will take time.

I concluded while writing this article (my last as chair) that we lawyers need to be like ostriches. Contrary to popular belief, these birds do not stick their heads in the sand, and even though they cannot fly, they are the fastest land birds. We lawyers plainly cannot fly, and we must not hide from our troubles. We need to act now as caretakers of our justice system, our clients and our profession to begin to change attitudes and practices.

At the conference, the royalty of the civil procedure kingdom discussed not only what is broken and what should be changed, but some also presented what is already being done in some courts and by some lawyers to make our system faster, cheaper, and more efficient, without losing sight of our ultimate objective: to obtain justice. In the spirit of the ostrich, I thought I would share some of these suggestions offered by Judge Shira Scheindlin (Southern District of New York), whose name is virtually synonymous with e-discovery; Chief Judge James Holderman (Northern District of Illinois), who persuaded his colleagues in the Seventh Circuit to undertake pilot projects on jury innovations and e-discovery; and Steve Susman, the prominent Texas lawyer who has figured out how to make more money with less effort.

Agree on practices that lead to efficiency

"Make love and not war" during pre-trial proceedings. That is Litigation Section leader Steve Susman's lesson to his young colleagues at Susman Godfrey. He explained that since he bills clients based on results, not effort, he is always looking for ways to be more efficient. He believes that most of what lawyers fight about before trial is not worth the effort. He has developed lists of proposed agreements for pre-trial proceedings and for trial. He sends these proposals to his adversary at the beginning of a case ("before they get really mad at each other"). The pretrial stipulations include:

- no letter writing campaigns over discovery disputes; all discovery issues to be discussed in emails and by phone;
- no depositions over three hours, and any statements by counsel at the deposition may be played by the other side to the jury;
- all papers will be served by email only—no hard copies and no additional time for mail service;
- for e-discovery, both sides will select five custodians (and potentially five more by agreement) for whom they receive all emails regardless of relevance; only documents written by a lawyer are withheld, and production of other privileged documents does not constitute a waiver; and
- to keep adversaries honest on their privilege logs and minimize privilege log disputes, each side selects a sample of 20 documents from the adversary's log that they agree to submit to the court for an independent privilege review.

(Susman's lists for pretrial and trial agreements are available online.)

Judge David Campbell (Arizona) liked Susman's lists so much that he attaches them to his pretrial order in complex cases. He reports that the lawyers in these cases have generally agreed on eight out of ten of the proposed stipulations.

Use the rule on proportionality

Proportionality was the theme of many of the conference recommendations about the excesses of discovery. A rule change is, however, unnecessary to achieve a better balance between expense and value in discovery. The ability to curtail discovery that is too costly given its value already exists under the rules. Rule 26(b)(2)(c)(iii) *requires* the court to limit discovery "if the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." The provision is under-utilized. The majority of respondents in the ABA Section of Litigation survey agreed that counsel typically do not request limitations on discovery under Rule 26(b)(2)(c) and that judges do not invoke the rule on their own initiative. Although no one likes discovery disputes, the rule is there for leverage in negotiations and for judicial action.

Use the Seventh Circuit E-Discovery Principles

The conference luncheon speaker was Judge Holderman, who described a pilot program he launched in his circuit to facilitate e-discovery. It addition to hortatory principles, the Seventh Circuit E-Discovery Principles include useful suggestions that any practitioner can employ, even in circuits that have not adopted the principles, including:

- detailed information to include in any ESI (electronically stored information) preservation letter;
- topics for discussion between the parties before the initial court status conference, such as the scope of preservation, how to handle inadvertent production under Federal Rule of Evidence 502, and the possible staging of discovery;
- other possible ESI discussion topics, including search methodologies, types of information that will not be discoverable, and production format; and
- areas in which lawyers and judges can educate themselves to help better address ESI issues, including FRCP rules that directly address ESI—Rules 26, 33, 34, 37, and 45.

Avoid onerous privilege reviews

Some lawyers have proposed agreements to avoid painstaking and costly privilege reviews that have become routine. Other lawyers in response were skeptical ing inadvertently produced privileged documents, because of the fear that third parties could assert that the privilege had been waived as to them. The Rules since 2008 provide protection for the asking, but Judge Scheindlin said at the conference that lawyers are not asking. Fed. R. Evid. 502(e) states, "An agreement on the effect of disclosure of a communication or information covered by the attorney-client privilege or work product protection is binding on the parties to the agreement, but not on other parties unless the agreement is incorporated into a court order."

The agreement of no privilege waiver under a "quick peek" arrangement (where a lawyer gets a quick perusal of an adversary's documents—without any prior privilege review or screening—for the purpose of limiting the later production) can be extended to third parties by seeking a court order. If the court "so orders" the parties' agreement, no third party can use the "quick peek" to obtain an otherwise privileged document on the theory that the "quick peek" constituted a waiver.

I'll ask the impolite question

The question no one asks in polite company—and it was not asked at the Duke conference—is whether lawyers, many of whom bill by the hour, might be secretly happy with a system that requires excessive amounts of lawyer time and corresponding expense. In the Litigation Section survey, views were mixed (56 percent agreement) among both plaintiffs' and defendants' lawyers as to whether economic models

in law firms encourage more discovery than necessary. Greedy lawyers, the theory goes, might look with disinterest at suggestions to save time and clients' money.

I believe this is a cynical and incorrect view, at least as to the vast majority of our colleagues. Litigators are faced all the time with situations in which their clients' interests conflict at least partially with their own economic or other interests. Recommendations to settle, to refrain from commencing doomed lawsuits, to press for a quick schedule, are all at odds with the economic interests of a lawyer who bills by the hour. Yet these recommendations are made, and followed, every day. I believe that it is our sense of professionalism, of what it means to be a lawyer, an officer of the court, and a fiduciary to our clients that motivates us. We nurture our justice system, not only because it provides our livelihood, but also because of its vital importance to society and our individual clients.

Addressing the excesses of e-discovery will also help our profession. A profession whose profitability depends on expensive and seemingly endless relevance and privilege review by its youngest members is against our self interest. At the conference we learned that discovery accounts for most of the cost of litigation, and that more than half of the cost of discovery comes from the relevance and privilege review, the mind-numbing tasks that employ our youngest lawyers. Besides being bored to tears, these lawyers do not get much training. Not surprisingly, many of them wish to leave the profession.

For readers who may still be wondering if striving for more efficiency may be against their financial self interest, I would ask them to take a longer view and consider client relationships. It is the rare lawyer who is so in demand that he or she can afford to gouge clients and send them off unhappy. Lawyers depend on repeat business and referrals to stay employed. The lawyer who provides excellent service, broadly defined, will be most successful. Excellent service increasingly means good results achieved without undue cost or delay.

We need to address the big issues of how best to achieve justice in a way that is procedurally fair and efficient. But that will take time. For now, we have tools within the bounds of the existing rules to make litigation less costly and more efficient. Exchanging best practices is a start and something we all can do to help promote the good health of our justice system, which provides for us and is a bedrock of our civilized world.

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This article appears in the Spring 2010 issue of *Litigation*.

Keywords: Civil litigation, Federal Rules of Civil Procedure

Resources

1. Duke Conference on Civil Procedure. Official site of the conference held by the Judicial Conference Advisory Committee for Civil Rules.
2. Webcasts of the Duke Conference on Civil Procedure. Webcasts of the sessions and panel discussion from the conference are available to the public for free.
3. Detailed Report of Civil Procedure Survey of ABA Section of Litigation Members.

Comments

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Litigation & Trial - Legal articles by personal injury attorney Max Kennerly

Published by Maxwell S. Kennerly, Esquire of The Beasley Firm, LLC

Posted on June 3, 2010 by Max Kennerly, Esq.

The Seventh Circuit's First Report On Electronic Discovery and The Candor of Counsel

At Electronic Discovery Law:

> Last month, the Seventh Circuit's Electronic Discovery Pilot Program Committee released its report on phase one of its Electronic Discovery Pilot Program. Initiated as a "multi-year, multi-phase process to develop, implement, evaluate, and improve pretrial litigation procedures that would provide fairness and justice to all parties while seeking to reduce the cost and burden of electronic discovery consistent with Rule 1 of the Federal Rules of Civil Procedure", the first phase of the program ended on May 1, 2010, after a seven month period in which the committee's Principles Relating to the Discovery of Electronically Stored Information were tested in practice. …
>
> Too lengthy to summarize, the full report is available here.

I had my fingers crossed for something better than the electronic discovery report released last year by the American College of Trial Lawyers, which, if adopted, would do little more than encourage frivolous discovery objections.

The Seventh Circuit report is far better; I've posted on Scribd a copy of their proposed standing electronic discovery order.

I am concerned, though, by the heavy reliance upon having attorneys meet-and-confer to discuss issues relating to electronically-stored information.

Sometimes attorneys aren't so candid when it comes to ESI, like in *Grider v. Keystone Health*:

> As stated in Finding of Fact 26, on March 1, 2004 Attorney Summers sent a letter to the court attaching a series of Declarations which affirmatively represented to the court that plaintiffs' allegations of bundling and downcoding lacked any factual basis, and that those claims were "without merit". Thereafter, defendant Keystone, through its counsel, Attorney Summers, refused to produce the underlying documents and data compilations which supported the Declarations on a number of frequently changing bases. Initially, Attorney Summers withheld the underlying documents and data compilations because they allegedly constituted lay opinion. Next, Attorney Summers withheld the information

> on the basis that it was expert opinion and immune from discovery. Finally, Attorney Summers asserted that the underlying information was privileged material pursuant to either the attorney-client privilege or the attorney work product doctrine.
>
> As noted by my colleague Senior United States District Judge J. William Ditter, Jr., "It is not good faith for a lawyer to frustrate discovery requests...with successive objections like a magician pulling another and another and then still another rabbit out of a hat." *Massachusetts School of Law at Andover, Inc. v. American Bar Association*, 914 F.Supp. 1172, 1177 (E.D.Pa. 1996). * * *
>
> The most egregious instance of late production involves Keystone's late production of claims data. Keystone claimed for years that it was unable to provide claims data. During the same time that Keystone and its counsel were feigning an inability to produce claims data (which it owned according to the ASA agreement with Synertech), Keystone was using claims data for its own self-serving purposes (i.e., the Declarations sent to the court on March 1, 2005). * * *
>
> This case is about claims processing. To deny plaintiffs the data which Keystone owns is equivalent to denying plaintiffs their day in court. Without this data it will be more difficult for plaintiffs to prove their claims. I conclude that this is exactly what defendant Keystone hoped to accomplish by thwarting discovery in this case.

The District Court sanctioned them, but sanction is more the exception than the rule, and the Third Circuit eventually reversed the sanction anyway, even though it found the conduct sanctionable.

Fact is, if defense counsel doesn't have enough of an incentive to be candid in discussing the availability of ESI — like if they face no real threat of sanction or a spoliation ruling — then odds are they won't be.

If the Seventh Circuit wants parties to successfully meet-and-confer, they should require the parties to submit to each other affidavits discussing the available sources of ESI to the best of the party's information, knowledge and belief. That will mean a lot more, and will be a lot more useful in the litigation, than a phone call or letter from an attorney whose primary goal is to conceal evidence.

The Indiana Law Blog

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Monday, July 26, 2010

COURTS - "PILOTING E-DISCOVERY RULES IN THE 7TH CIRCUIT"

Jason Krause reports at Law.com today in an article that begins:

> Magistrate Judge Nan Nolan of the U.S. District Court for the Northern District of Illinois had a long background as a criminal defense attorney before becoming a judge. She says that her background left her unprepared for the battles over discovery of electronic evidence she has encountered in the world of civil litigation. "I was not able to get my arms around all of the fighting over discovery," she says. "I know that some people have snickered about this idea that you can get lawyers to make nice and cooperate on discovery. But I believe it is possible."
>
> Under the leadership of Chief Judge James F. Holderman, Nolan has helped launch a pilot program to address electronic discovery issues: 7th Circuit E-Discovery Pilot Program. Taking their cues from, among other sources, the Sedona Conference Cooperation Proclamation, the 7th Circuit E-Discovery Committee is attempting to fix some of the most intractable discovery problems in litigation.
>
> Amendments to the Federal Rules of Civil Procedure put in place at the end of 2006 were supposed to force lawyers to meet and hash out discovery issues early. However, Nolan, Holderman and other judges are frustrated that despite the rule changes, electronic discovery continues to be an expensive and inefficient process in need of reform. "The central premise of the 2006 amendments is to meet and confer with the other side and settle issues early," says Magistrate Judge John Facciola of the U.S. District Court for District of Columbia. "The fact that this project exists suggests that the hopes have not been fully realized."

Posted by Marcia Oddi on July 26, 2010 09:24 AM

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SYMPOSIUM: WHAT IT MEANS TO BE A LAWYER IN THE DIGITAL AGE: Article: A Discussion of the Seventh Circuit's Electronic Discovery Pilot Program and Its Impact on Early Case Assessment

NAME: Tina B. Solis*

BIO:

* Ms. Solis is a partner in the litigation department at the law firm of Ungaretti & Harris LLP. She chairs the firm's electronic discovery committee and routinely counsels clients on matters involving electronic discovery issues.

LEXISNEXIS SUMMARY:

... Since ESI can include voluminous amounts of data, e-discovery creates the opportunity to unduly burden opposing counsel with unrealistic discovery requests. ... AN OVERVIEW OF THE PILOT PROGRAM AND PRINCIPLES The Seventh Circuit Court of Appeals' Electronic Discovery Committee created a pilot program called the Principles Relating to the Discovery of Electronically Stored Information ("Principles"). ... An expert in the field of e-discovery can assist counsel and his or her client in identifying where the client's electronic information is stored and what type of electronic information counsel should be requesting from his or her opponent. ... If a dispute arises, the liaisons can get involved to try to resolve it. ... Obtaining documents in their native format allows counsel to review metadata. ... As required by the Seventh Circuit's Principles, parties must "familiarize themselves with the electronic discovery provisions of Federal Rules of Civil Procedure, . . . applicable State Rules of Procedure; familiarize themselves with the Advisory Committee Report on the 2006 Amendments to the Federal Rules of Civil Procedure, and familiarize themselves with the Seventh Circuit's Principles." ... The intent of the Principles is that through cooperation and proportionality, the costs associated with e-discovery can be dramatically reduced by focusing the parties' attention on the issues that are at the crux of the dispute, thereby disallowing unfettered discovery.

HIGHLIGHT:

TEXT:
[*563]

I. Introduction

The Federal Rules of Civil Procedure were amended, effective December 1, 2006, to address issues regarding the discovery of Electronically Stored Information (ESI). n1 Rule 34 now authorizes requests for production of documents, including "electronically stored information." n2 Such authority, however, can carry with it tremendous consequences. Since ESI can include voluminous amounts of data, e-discovery creates the opportunity to unduly burden opposing counsel with unrealistic discovery requests. As such, certain situations do not justify the sometimes over-reaching requests that seek to obtain ESI. Amended Federal Rule 26(b)(2)(B) addresses this issue and provides protection from unduly burdensome or expensive discovery requests. n3 The rule "aspires to eliminate one of the most prevalent of [*564] all discovery abuses: kneejerk discovery requests served without consideration of cost or burden to the responding party." n4 Rule 26 essentially codifies the court's findings in Zubulake v. UBS Warburg, which was the seminal case on cost shifting in e-discovery prior to the amendments. n5 Nonetheless, e-discovery costs have continued to increase. n6

As a result, trial bars and local jurisdictions have performed studies on the actual effects of e-discovery. In 2008, the Sedona Conference issued a proclamation that cooperation is analogous to zealous representation. n7 The Sedona Principles are well known in the profession for setting forth the best practices in the e-discovery arena. In 2009, the Institute for the Advancement of the American Legal System reported that "it costs between $ 5,000 and $ 7,000 to process, review, cull, and produce one gigabyte of data. A midsize case with 500 GB of data could cost $ 2.5 to $ 3.5 million on discovery alone." n8 The Sedona Conference's Proclamation, along with the skyrocketing costs of e-discovery, led the Seventh Circuit to take action.

II. The Seventh Circuit's Electronic Discovery Pilot Program

A. AN OVERVIEW OF THE PILOT PROGRAM AND PRINCIPLES

The Seventh Circuit Court of Appeals' Electronic Discovery Committee created a pilot program called the Principles Relating to the Discovery of Electronically Stored Information ("Principles"). n9 The members of the Seventh Circuit's E-Discovery Committee wanted to "reduce the rising burden and cost of discovery in litigation in the United States brought on primarily by the use of ESI in today's electronic world." n10

The pilot program includes a set of guidelines, or principles, to assist parties in dealing with electronic discovery issues. During the program's [*565] first phase, from October 2009 to May 2010, certain district court judges, magistrate judges, and bankruptcy judges in the Seventh Circuit have agreed to adopt the Principles in select cases through the entry of a standing order. n11

The Principles are divided into three categories. The first category is called "General Principles" and sets forth the program's purpose. n12 The second category involves "Early Case Assessment Principles" and identifies the issues the parties and their counsel should be assessing and discussing once litigation has been initiated. n13 The third category is the "Education Provisions" and requests that parties and their counsel become familiar with the fundamentals of the discovery of ESI. n14

Currently, there are approximately eighty-one cases that are guided by the Principles. n15 After the first phase concludes, in May 2010, the Seventh Circuit's Electronic Discovery Committee will receive feedback from the lawyers and judges involved, and use this feedback to reassess and refine the Principles. n16 "Phase Two [of the pilot program]

will then proceed from June 2010 to May 2011. In May 2011, the Seventh Circuit's E-Discovery Committee will then formally present its findings and issue its final Principles." n17

The Principles recognize the broad effect e-discovery has had on litigation. The Principles attempt, through cooperation and proportionality, to narrowly tailor e-discovery to the relevant issues in the dispute and thereby reduce litigation costs. This article discusses the Principles' impact on the tasks relating to ESI that must be identified and discussed not only with the client, but also with opposing counsel, prior to the commencement of the discovery process.

B.THE PRINCIPLES EMPHASIZE COOPERATION AND PROPORTIONALITY

The Principles are intended "to incentivize early and informal information exchange on commonly encountered issues relating to evidence preservation and discovery, paper and electronic, as required by Rule 26(f)(2)." n18 In order to achieve this goal, the Principles focus on cooperation and proportionality. Specifically, the General Principles provide: [*566]

Principle 1.01 (Purpose)

The purpose of these Principles is to assist courts in the administration of Federal Rule of Civil Procedure 1, to secure the just, speedy, and inexpensive determination of every civil case, and to promote, whenever possible, the early resolution of disputes regarding the discovery of electronically stored information ("ESI") without Court intervention. Understanding of the feasibility, reasonableness, costs, and benefits of various aspects of electronic discovery will inevitably evolve as judges, attorneys and parties to litigation gain more experience with ESI and as technology advances. n19

Principle 1.02 (Cooperation)

An attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions. n20

Principle 1.03 (Discovery Proportionality)

The proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C) should be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable. n21

These General Principles reiterate the Sedona Conference's Proclamation and set forth the overarching theme for discovery. The days of crushing litigation tactics, overly broad requests, and standard discovery objections are gone. Principle 1.03 verifies that discovery requests must be specific and narrowly tailored. n22 As a result, counsel must work with his or her [*567] client to identify the pertinent issues in the dispute so that he or she can speak intelligently with opposing counsel about how the client's information is stored and retrieved prior to the initial status conference. Oftentimes, this may be difficult early on in the litigation when issues continue to be investigated, but the Principles now require that counsel make every effort to focus on the issues that are at the crux of the dispute and then identify where ESI responsive to those issues is stored and how it is retrieved. n23

Counsel for the parties also must work together to ensure that e-discovery requests and costs are proportional to the amount at stake, the issues being litigated, and discovery does not unnecessarily prolong the case's efficient adjudication. n24 Discovery about discovery is discouraged under the Principles. n25 Instead, requests should be narrowly tailored. n26 Finally, opposing counsel need to work with one another in an attempt to resolve their discovery disputes before seeking court intervention, in an attempt to reduce the increasing costs of discovery.

III. The Principles Require that the Parties Meet and Confer Prior to the Initial Status Conference

The second category of Principles, the Early Case Assessment Principles, identifies the topics that the parties and their counsel should discuss before the initial status conference.

A. TOPICS TO BE DISCUSSED PRIOR TO THE INITIAL STATUS CONFERENCE

Principle 2.01 of the pilot program requires counsel to meet prior to the initial status conference to discuss, among other things:

(1) the identity of relevant and discoverable ESI; (2) the scope of discoverable ESI; (3) the formats for preservation and production of ESI; (4) the potential for conducting discovery in phases . . . as a method for reducing costs and

burden; and (5) the procedures for handling inadvertent production of privileged information and other privilege waiver issues n27

According to the Principles, each party, including its attorneys and clients, must inventory its own data and retrieval processes when litigation [*568] is initiated. This must be done immediately as Principle 2.01 mandates that the parties meet and confer regarding ESI issues prior to the initial status conference, i.e., before the parties have even gone into court. n28 The meet and confer is of utmost importance because issues regarding the format, timetable, and scope of ESI will be determined.

At the meet and confer, both parties must discuss their entire discovery plan and must narrow and agree on the discoverable issues/topics. n29 Both parties should come to the meet and confer knowing the format and types of ESI they seek, their proposed discovery requests, and the timeline for production. After discussions with opposing counsel, the parties must cooperate and ultimately reach an agreed discovery plan to present to the court at the initial status conference.

The Principles provide that any disputes regarding ESI that parties are unable to resolve at the meet and confer must be brought to the court's attention at the initial status conference or as soon as practicable. n30 If the court concludes that a party failed to cooperate in good faith in the meet and confer process, it may require further discussions prior to the implementation of discovery and/or, if necessary, impose sanctions. n31 The Principles also provide that if a dispute is not brought to the court's attention until it becomes advantageous for a party to do so, that party may be faced with cost shifting or sanctions. n32 Thus, the Principles incentivize the parties to bring unresolved ESI disputes to the court's attention as soon as possible.

As noted herein, ESI issues have a profound impact on the entire case, and must be carefully analyzed from all aspects. If a detail about ESI is overlooked at the meet and confer, counsel risks waiving it. n33 Parties must therefore map out their entire discovery strategy, including the format of ESI sought and the method for dealing with production of privileged information, as soon as litigation commences.

B. THE PRINCIPLES REQUIRE EACH PARTY TO HAVE A LIAISON TO ASSIST IN RESOLVING E-DISCOVERY DISPUTES.

Principle 2.02 of the Seventh Circuit's Pilot Program requires each party to designate an e-discovery liaison to meet, confer, and attend court hearings on the subject. n34 The e-discovery liaison must generally be able to [*569] (a) participate in e-discovery dispute resolution, (b) know the party's e-discovery efforts, (c) be familiar with the party's electronic systems and capabilities, and (d) know about the technical aspects of e-discovery. n35

Counsel and their clients must plan appropriately to determine who will serve as the liaison. Prior to the implementation of the Principles, counsel oftentimes consulted with a client's in-house Information Technology (IT) Manager to assist in the identification and location of the client's ESI. While consulting with the client's in-house IT Manager is still an important step in the early case assessment, counsel should strongly consider retaining an expert to serve in the role of liaison. An expert in the field of e-discovery can assist counsel and his or her client in identifying where the client's electronic information is stored and what type of electronic information counsel should be requesting from his or her opponent. This information can then be discussed between the parties at the meet and confer. If a dispute arises, the liaisons can get involved to try to resolve it. Indeed, the intent of the liaison requirement is "to get the experts talking to one another" to streamline the process. n36 Moreover, if a dispute must be brought to the court's attention, having the parties' liaisons available to assist the judge in understanding the parties' ESI will be invaluable.

Electronic discovery represents thirty-five percent of the total cost of litigation. n37 That, coupled with the pilot program on e-discovery and the time in which ESI must be assessed, demonstrates that best practices require engaging an e-discovery expert to assess and implement an e-discovery strategy at the outset of litigation and to serve as the party's liaison. Moreover, experts in this field are oftentimes lawyers themselves and understand and appreciate the legal issues as well as the technical aspects surrounding ESI and e-discovery. An expert is therefore in the best position to serve as the liaison, so he or she can properly asses, strategize, and implement an e-discovery plan at the outset of the litigation.

IV. The Principles Also Address Topics to be Discussed at the Rule 26 Conference

In addition to preservation requests and orders, n38 the Principles also provide guidance on the topics to be discussed at the Rule 26(f) conference or shortly thereafter. The Principles provide: [*570]

Principle 2.05 (Identification of Electronically Stored Information)

(a)At the Rule 26(f) conference or as soon thereafter as possible, counsel or the parties shall discuss potential methodologies for identifying ESI for production.

(b)Topics for discussion may include, but are not limited to, any plans to:

(1)eliminate duplicative ESI and whether such elimination will occur only within each particular custodian's data set or whether it will occur across all custodians;

(2)filter data based on file type, date ranges, sender, receiver, custodian, search terms, or other similar parameters; and

(3)use keyword searching, mathematical or thesaurus-based topic or concept clustering, or other advanced culling technologies. n39

Principle 2.06 (Production Format)

(a)At the Rule 26(f) conference, counsel or the parties should make a good faith effort to agree on the format(s) for production of ESI (whether native or some other reasonably usable form). If counsel or the parties are unable to resolve a production format issue, then the issue should be raised promptly with the Court.

(b)ESI stored in database or a database management system often can be produced by querying the database for discoverable information, resulting in a report or a reasonably usable and exportable electronic file for review by the requesting counsel or party.

[*571]

(c)ESI and other tangible or hard copy documents that are not text-searchable need not be made text-searchable.

(d)Generally, the requesting party is responsible for the incremental cost of creating its copy of requested information. Counsel or the parties are encouraged to discuss cost sharing for optical character recognition (OCR) or other upgrades of paper documents or non-text searchable electronic images that may be contemplated by each party. n40

Cost-saving measures are a topic for discussion at the Rule 26 conference. n41 For example, the parties should, in good faith, attempt to agree on whether the production will eliminate duplicative material in its entirety or for just a particular subset of the production. n42 If one custodian's data is almost identical to another, limiting or eliminating the discoverability of that data will save time and costs.

Another important topic of the Rule 26 conference is the type of searches that will be implemented for each party's production. n43 These searches can be based on keywords, concept clustering, or a number of other advanced culling technologies. Parties are strongly encouraged to work with one another and use their liaisons to develop and agree upon a search methodology, which may include defined search terms. It is advantageous for both parties to agree on their own list of terms as opposed to having the court impose its own methodology, which may benefit neither. n44

Finally, another area that must be addressed during the Rule 26 conference is the format(s) for production of ESI. n45 Typically, a party should seek the ESI in its native format. Obtaining documents in their native format allows counsel to review metadata. n46 [*572]

The courts are undecided as to whether or not there is a presumption for, or against, providing metadata. Some courts find that because affirmative action must be taken to remove metadata from documents, it should be provided, unless the producing party objects. n47 Other courts, including in Illinois, see no need to provide metadata, unless it is specifically requested, because of the "undue cost and burden" of reproducing and recovering metadata. n48

The pilot program provides that "data in metadata fields that are frequently updated automatically, such as last-opened dates," n49 are generally "not discoverable in most cases, and if any party intends to request the preservation or production of these categories, then that intention should be discussed at the meet and confer or as soon thereafter as practicable." n50 The parties, therefore, should negotiate a mutually acceptable metadata discovery plan prior to the initial status conference, including the types of metadata they seek. With a plan, the parties can avoid being subjected to the court's status quo, which again may benefit neither. Moreover, the parties may waive the issue if the format for production is not discussed. n51

V.Conclusion

The discoverability of ESI has changed the entire course of litigation. To address these changes, the Federal Rules of Civil Procedure have been amended, and local jurisdictions, including the Seventh Circuit, have implemented programs to supplement the rules with the hopes of fostering cooperation, requiring proportionality, and reducing the costs associated with e-discovery. As required by the Seventh Circuit's Principles, parties must "familiarize themselves with the electronic discovery provisions of Federal Rules of Civil Procedure, . . . applicable State Rules of Procedure; familiarize themselves with the Advisory Committee Report on the 2006 Amendments to the Federal Rules of Civil Procedure, and familiarize themselves with [the Seventh Circuit's] Principles." n52

In the event of litigation, counsel and his or her client must carefully map out an e-discovery plan at the outset, which includes hiring a liaison and adequately preparing for the meet and confer prior to the initial status [*573] conference. At the initial status conference, the parties must raise any disputes with the court that the parties' liaisons were unable to resolve. The failure to do so may result in a waiver of those issues. At the time of the Rule 26 conference, the parties must also be prepared to discuss cost-saving measures and the type of format for the production, among other issues.

The implementation of the Principles is forcing counsel and their clients to not only understand the identity and location of the client's ESI prior to the initial status conference, but also to meet and confer with opposing counsel prior to the initial status conference. n53 The intent of the Principles is that through cooperation and proportionality, the costs associated with e-discovery can be dramatically reduced by focusing the parties' attention on the issues that are at the crux of the dispute, thereby disallowing unfettered discovery.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewAdministrative RecordDisclosure & DiscoveryCivil ProcedureDiscoveryGeneral OverviewCivil ProcedurePretrial MattersConferencesCase Management

FOOTNOTES:

n1 FED. R. CIV. P. 16, 26, 33, 34, 37, 45.

n2 FED. R. CIV. P. 34.

n3 FED. R. CIV. P. 26.

n4 Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 358 (D. Md. 2008) (citing Rule 26 Advisory Committee Notes).

n5 See Zubulake v. UBS Warburg, L.L.C., 217 F.R.D. 309 (S.D.N.Y. 2003).

n6 Seventh Circuit Elec. Discovery Comm., Seventh Circuit Electronic Discovery Pilot Program 7 (Oct. 1, 2009), available at http://www.7thcircuitbar.org/associations/1507/files/Statement1.pdf.

n7 The Sedona Conference, The Sedona Conference Cooperation Proclamation 1 (The Sedona Conference Working Group Series, July 2008), available at http://www.thesedonaconference.org/content/tsccooperationproclamation/proclamation.pdf.

n8 7th Circuit Pilot Program Provides a New Approach to E-Discovery, THE THIRD BRANCH, Nov. 2009, at 4, available at http://www.uscourts.gov/News/TheThirdBranch/TTBviewer.aspx?doc=/usCOurts/News/TTB/archive/2009-11%20Nov.pdf?page=4.

n9 Seventh Circuit Elec. Discovery Comm., supra note 6, at 11.

n10 Id. at 7.

n11 Id. at 10.

n12 Id. princs. 1.01-1.03, at 11.

n13 Id. princs. 2.01-2.06, at 11-16.

n14 Seventh Circuit Elec. Discovery Comm., supra note 6, princs. 3.01-3.02, at 16.

n15 Webinar: Reforming Discovery: The Seventh Circuit E-Discovery Pilot Program (Law.com broadcast Feb. 17, 2010).

n16 Seventh Circuit Elec. Discovery Comm., supra note 6, at 10.

n17 Id.

n18 Id. at 9.

n19 Id. princ. 1.01, at 11.

n20 Id. princ. 1.02, at 11.

n21 Seventh Circuit Elec. Discovery Comm., supra note 6, princ. 1.03, at 11.

n22 Id.

n23 Id. at 12.

n24 Id. at 14.

n25 Id. princ. 2.04, at 14-15.

n26 Seventh Circuit Elec. Discovery Comm., supra note 6, at 14.

n27 Id. princ. 2.01, at 11-12.

n28 Id. princ. 2.01(a), at 11.

n29 Id.

n30 Id. princ. 2.01(b), at 12.

n31 Seventh Circuit Elec. Discovery Comm., supra note 6, princ. 2.01(d), at 12.

n32 Id.

n33 See generally id. princ. 2.04, at 14-15 (explaining the necessary procedures for preservation of ESI).

n34 Id. princ. 2.02, at 12.

n35 Id.

n36 Webinar: Reforming Discovery: The Seventh Circuit E-Discovery Pilot Program (Law.com broadcast Feb. 17, 2010).

n37 OSTERMAN RESEARCH, INC., THE GROWING IMPORTANCE OF E-DISCOVERY ON YOUR BUSINESS 1 (2008).

n38 Seventh Circuit Elec. Discovery Comm., supra note 6, princ. 2.03, at 13-14.

n39 Id. princ. 2.05, at 15.

n40 Id. princ. 2.06, at 15-16.

n41 Id. princ. 2.06(d), at 16.

n42 Id. princ. 2.05(b)(1), at 15.

n43 Seventh Circuit Elec. Discovery Comm., supra note 6, princ. 2.05(b)(3), at 15.

n44 Webinar: Reforming Discovery: The Seventh Circuit E-Discovery Pilot Program (Law.com broadcast Feb. 17, 2010).

n45 Seventh Circuit Elec. Discovery Comm., supra note 6, princ. 2.06(a), at 15.

n46 The Dictionary.com definition of metadata is "data about data." See Dictionary.com, http://dictionary.reference.com/ (last visited May 6, 2010) (citing Wordnet 3.0 by Princeton University (2006)) (entry for "metadata," second definition). It includes information regarding prior versions of a document; deletions, additions, and changes to a document; dates and times of review and revision; and other historical information about a document. See Wikipedia.com, http://en.wikipedia.org/Metadata (last visited May 6, 2010).

n47 Williams v. Sprint/United Mgmt. Co., 230 F.R.D. 640, 652 (D.C. Kan. 2005).

n48 Autotech Techs. L.P. v. Automationdirect.com, Inc., 248 F.R.D. 556 (N.D. Ill. 2008); Ky. Speedway, L.L.C. v. Nat'l Ass'n of Stock Car Auto Racing, Inc., 2006 WL 5097354, 8 (E.D. Ky. 2006); Wyeth v. Impax Labs., Inc., 248 F.R.D. 169, 171 (D.C. Del. 2006).

n49 Seventh Circuit Elec. Discovery Comm., supra note 6, princ. 2.04(d)(4), at 14.

n50 Id. princ. 2.04(d), at 14.

n51 Id. princ. 2.04(c), at 14.

n52 Id. princ. 3.01, at 16.

n53 Id. princ. 2.01, at 11-12.

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PILOT PROGRAM ATTACKS E-DISCOVERY BURDENS

Christopher Danzig

Ever since becoming chief judge of the U.S. District Court for the Northern District of **Illinois** four years ago, James **Holderman** has listened to the same lament from business executives and attorneys about the state of **electronic discovery**: It's expensive, burdensome and time consuming for everyone involved. Over and over, he heard about the need to minimize that burden.

In 2009, **Holderman**, along with **Federal** Magistrate Judge Nan Nolan, created the 7th Circuit **Electronic Discovery** Pilot Program. The pilot program is not the first effort to address the problems with e-discovery. But **Holderman** and the large committee of legal professionals involved in the project have attracted nationwide attention for their novel approach to solving the problem.

Not only did the committee formulate core principles for fairly and efficiently conducting e-discovery, they tested the principles in real cases throughout the 7th Circuit and surveyed participants on the effects.

"The one thing that makes this really different is that it's being tested on live cases. [We] see what people are actually experiencing rather than just saying, 'This is a what we think is a great idea,'" says Thomas Lidbury, the program's early case assessment subcommittee co-chair.

From October 2009 through March 2010, 13 judges in **Holderman's** district implemented the pilot program's principles in 93 different cases. This brief "Phase One" provided a preliminary snapshot of how the principles affected litigation, according to the "Report on Phase One" that was released in May.

In surveys that were sent to the participating judges and 285 attorneys during Phase One, results showed the principles helped the pretrial process run faster and smoother. Ninety-two percent of the judges agreed the principles "had a positive effect on counsels' ability to resolve discovery disputes before requesting court involvement and reach agreements on how to handle the inadvertent disclosure of privileged information or work

product."

Phase Two began in July. It will continue for at least a year and uses a larger sample size. The extended length will accommodate slow-moving cases and allow the committee to better analyze the benefits of their principles as well as adjustments that still need to be made.

The continually growing committee has lofty goals. Although it's still quite new, **Holderman** believes people are drawn to the program because they see the possibility of a solution.

"We're not just dealing with it," **Holderman** says. "We're going to solve it."

New Solution

The pilot program committee includes all sides of the legal community: plaintiffs, defense and in-house attorneys; judges; experts in academia; and e-discovery vendors.

The committee's first goal was to "develop guiding principles for the discovery of ESI [Electronically Stored Information] that are fair to all parties and minimize the cost and burden of discovery in proportion to the litigation," according to the Phase One report. (The document is available at www.7thcircuitbar.org.)

At initial meetings in 2009, the committee quickly figured out the four problem areas that it would address: cooperation, discovery proportionality, early case assessment and education.

Most of these are already mentioned in the **Federal** Rules of Civil Procedure, says Karen Quirk, the pilot program's early case assessment subcommittee co-chair. Unfortunately, parties sometimes lose sight of them in the heat of litigation.

Because of the committee's diversity, it took more work to hash out the specific principles. The early case assessment Section includes tasks that meet-and-confer conferences should accomplish, explains the types of ESI that are generally discoverable or non-discoverable, and shows how to give a proper response to a preservation request (see "Specific Strategies," p. 67).

The cooperation and proportionality principles underscore the need to keep requests and costs "reasonably targeted, clear, and as specific as practicable." The education principles briefly explain the duty to become and remain knowledgeable about e-discovery.

Making a Difference

Holderman says the result was a product of substantial debate and compromise. The compromise seems largely

successful.

In the survey, 84 percent of the judges agreed that the principles "increased" or "greatly increased" the level of cooperation between counsel.

The principles also "increased" or "greatly increased" the fairness of the discovery process, according to 43 percent of the responding attorneys. But more than half-- 55 percent--stated they didn't see an effect.

It turned out that one of the most successful principles--the mandatory involvement of e-discovery liaisons--also began as one of the committee's most controversial. The liaison is a court representative from each litigant who is knowledgeable about the party's e-discovery efforts and familiar with their electronic systems.

All of the surveyed judges either "agreed" or "strongly agreed" that the involvement of e-discovery liaisons contributed to more efficient discovery.

Initially, some committee members thought an e-discovery liaison would require litigants to hire more experts or incur more cost. But it doesn't, explained Quirk, who recently left Winston & Strawn with plans to go in-house. An e-discovery liaison can even be the counsel of record.

Holderman says the program has generated enough buzz nationwide that counsel anywhere could cite the principles in court as a useful guidance.

"Even if you're not in a case [with] a judge that has adopted the pilot program," Quirk says, "you can still use these principles as a road map."

Specific Strategies

THE PILOT PROGRAM INCLUDES LISTS TO HELP COUNSEL HANDLE e-discovery more efficiently and fairly. They include issues to consider at a meet-and-confer:

- Identification of discoverable electronically stored information (ESI);

- Scope of discoverable ESI to be preserved by the parties;

- Formats for preservation and production of ESI;

- Potential for conducting discovery in stages to reduce costs and burden

- Procedures for handling inadvertent production of privileged information and other privilege waiver issues.

---- INDEX REFERENCES ---

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E-discovery pilot programs illustrate opportunities to avoid unnecessary cost

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USA
September 22 2010

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Electronic discovery, or e-discovery, "is a major, if not the predominant, factor behind rising litigation costs and delays and presents serious challenges to the court system's ability to resolve disputes ranging from commercial matters to personal injury cases, in an efficient, costeffective manner."i Responses to e-discovery challenges are taking many different forms: as the focus of court opinions,ii in changes to state and federal discovery rules,iii as the topic of prestigious academic conferences,iv and in the creation of e-discovery pilot programs.v This alert summarizes recent e-discovery reforms in two jurisdictions and provides practical suggestions on how to implement these ideas to reduce the costs of e-discovery.

SEVENTH CIRCUIT PILOT PROGRAM

The Seventh Circuit is proactively confronting some of the challenges presented by electronic discovery. The Seventh Circuit Electronic Discovery Committee ("E-Discovery Committee") consists of trial judges, in-house counsel, private practitioners, government attorneys, academics, and expert litigation consultants. Roughly five months after its first meeting, the EDiscovery Committee published its initial report and commenced the Seventh Circuit Electronic Discovery Pilot Program.

The E-Discovery Committee focused the pilot program on three high-impact areas for reform: preservation, early case assessment, and education.vi Their overarching mandate was to reshape the state of discovery "to assist courts in the administration of Federal Rule of Civil Procedure 1, to secure the just, speedy, and inexpensive determination of every civil case, and to promote whenever possible, the early resolution of disputes regarding the discovery of electronically stored information [ ] without Court intervention."vii

The Committee created guiding principles (the "Principles") that decry the use of vague and overly broad preservation and discovery requests,viii and emphasize the importance of good faith efforts, proportionality, and cooperation in the areas of preservation and discovery.ix The Principles specifically:

Underscore the importance of a meaningful 'meet-and-confer', along with the possibility of sanctions in the event that a party does not cooperate and participate in good faith during a 'meet-and-confer'. (Principle 2.01)
Require the appointment of e-discovery liaison(s) by the parties during the 'meetand-confer' in the event that there is an impasse in the cooperative effort. (Principle 2.02)
Call for the elimination of overly broad preservation requests and preservation orders. (Principle 2.03)
Further define the scope of preservation, adding the rebuttable presumption that certain types of ESIx (deleted or fragmented data on hard drives, RAM or ephemeral data, on-line access data, automatically updated metadata fields, duplicative backup data, etc.) are not discoverable. (Principle 2.04)
Require counsel to educate themselves before every 'meet-and-confer' on the applicable e-discovery rules. (Principle 3.01)

After the Principles were published, the E-Discovery Committee took a phased approach to implementing the pilot program. In the first phase, participating judges from the Seventh Circuit agreed to adopt the Principles and implement them in selected cases from October 2009 to May 2010; the attorneys in those particular cases were also asked to participate.

The results of Phase One were published in a 425-page report which analyzed the reactions of the program participants. Thirteen judges and 285 attorneys were included in the first phase, and these judges and about half of the attorneys completed the concluding questionnaire. The judiciary unanimously acknowledged that the Principles had a positive impact on the discovery process. The attorneys reaction was positive, but not overwhelmingly so: one-third of the attorneys surveyed said that they noticed positive affects during the test phase, and the vast majority of the rest claimed they noticed no impact on discovery.

The second phase of the pilot program began in June and is scheduled to run until May 2011. Orrick will publish the results and analysis of Phase Two when they become available next year.

NEW YORK STATE E-DISCOVERY REPORT

As the Seventh Circuit concluded the first stage of its E-Discovery Pilot Program, the New York State Unified Court System received a report recommending that New York state implement e-discovery pilot programs of its own. In a March 16, 2010 press release, Chief Judge Jonathan Lippman and Chief Administrative Judge Ann Pfau announced the release of this report entitled, *A Report to the Chief Judge and Chief Administrative Judge: Electronic Discovery in the New York State Courts* (the "New York Report").xi

Even before the publication of the New York Report, New York had state court rules encouraging 'meet-and-confers' between parties.xii The authors of the report conclude that this was an insufficient effort, and that "the reasonable, proportional and cooperative resolution of most e-discovery issues" is still not being achieved.xiii While recognizing that e-discovery requires cooperation between lawyers and the courts, the report states that e-discovery is "in large part, a judicial management issue."xiv

The New York Report expressed concern about the impact of the lack of uniform guidance in the area of e-discovery. Attorneys in New York courts often stipulate to exclude electronic discovery citing the exorbitant costs, length of time required, and the lack of experience of many attorneys and judges with the subject.xv The New York Report offers several key recommendations including the creation of an E-Discovery Working Group, facilitating a more effective Preliminary Conference, improving e-discovery education and training, designating court-attorney referees, and establishing an institutional presence at the Sedona Conference®.xvi

In the months since the release of the report, the New York State Court System has begun to implement some of the report's recommendations. Nassau Supreme Court Justice Ira B. Warshawsky was designated to serve as New York's institutional presence at the Sedona Conference®. Additionally, changes to the Uniform Rules of Trial Courts went into effect on August 18, 2010.xvii Finally, an E-Discovery Working Group was created. The Working Group consists of twenty-six members and its first meeting is scheduled for mid-October 2010. The Court system anticipates that the Working Group will take over management of the New York Report's recommendations, especially with regard to two long-term pilot programs.xviii

The New York Report's pilot programs focus on judicial management to foster cooperation between litigants on discovery issues. The first program involves the supplementation of the initial disclosures, as required by New York CPLR § 3101.xix The initial disclosures, information the parties share in advance of the preliminary conference, would require the following additional information:

> Identification of key IT personnel
> Whether preservation measures have been implemented
> Identification of computer systems that might contain relevant information
> Whether a party intends to claim that certain relevant ESI is inaccessiblexx

The second program creates an "Affirmation of E-Discovery Compliance," to be jointly signed and certified by counsel, and submitted to the court prior to the preliminary conference.xxi The affirmation would include three lists: (1) e-discovery topics and disputes discussed and resolved at the parties' 'meet-and-confer'; (2) e-discovery disputes that the parties could not resolve on their own; and (3) any miscellaneous issues that demand the court's attention.xxii These lists would help courts address e-discovery issues as early as possible and would allow for the early appointment of "court-attorney referees" to assist in the resolution of any lingering disputes.xxiii

The New York Report concludes by stressing the need for a "long term commitment on the part of the court system and its users, particularly the bar, to work together not only to address new e-discovery case management challenges as they arise but also to change the present litigation culture as it relates to e-discovery."xxiv

THE COOPERATION PROCLAMATION

The Sedona Conference® Cooperation Proclamation ("The Proclamation")xxv significantly influenced the direction of both the Seventh Circuit and New York State efforts. The Proclamation, published in July 2008, "promote[s] open and forthright information sharing,

dialogue (internal and external), training, and the development of practical tools to facilitate cooperative, collaborative, transparent discovery."xxvi In so doing, the Sedona Conference hopes to lessen adversarial conduct in pre-trial discovery and to "refocus litigation toward the substantive resolution of legal disputes."xxvii

The Cooperation Proclamation has been cited explicitly in over a dozen cases in just the past year and endorsed by more than 100 federal and state judges.

THE TAKE-AWAY

These initiatives emphasize the need to address ediscovery issues in the meet and confer and then memorialize agreements in ESI stipulations or protocols. When applied effectively, this trend can avoid expensive and risky motions practice, improve efficiency and reduce cost. Although these recommendations may not be suitable for every matter, it is never productive to ignore the challenges of ESI or wait to address e-discovery disputes until motions practice, after production is already underway. Accordingly, the following best practices should be considered:

Raise potential discovery issues in your earliest communications with opposing counsel; some remedies, like cost shifting, may become unavailable if your position is not timely raised. See Orrick's Alert on Fed. R. Evid. 502.

The corporate client should consider developing a standard ESI protocol template to avoid inefficiency and inconsistency amongst outside counsel; discovery counsel can assist in making a comprehensive, client-specific template. This template should address:

- Obligations related to inaccessible data and other challenging technologies such as instant messaging and text messages;
- Limitations on the number custodians;
- The procedure for agreeing to, or objecting to, a list of search terms;
- De-duplication specifications;
- Data production specifications;
- Native format production;
- The production of metadata;
- The production of documents containing source code;
- The scope of privilege and confidentiality;
- The creation of privilege logs;
- The timing and sequence of electronic discovery; and
- Clawback agreements for inadvertently produced privileged information.

The corporate client should consider developing a standard 'meet and confer' checklist for its outside counsel to ensure consistent levels of preparation; discovery counsel can assist in making a comprehensive, client-specific checklist. Also consider reviewing the Sedona Conference "Jumpstart" outline, available on their Working Group 1 website: http://www.thesedonaconference.org/content/miscFiles/publications_html?grp=wgs110 (last visited August 26, 2010). The meet and confer checklist should ensure counsel:

Have a working understanding of the client's technology infrastructure and protocols (e.g., email format, data retention policies, back-up or disaster recovery practices);
Know the client's preferences with respect to production format;
Conduct IT and custodian interviews to allow informed discussion of tiered discovery starting first with the most probative custodians and data sources; and
Evaluate the value of the case and the likelihood of settlement to determine what scope of discovery is proportional to the value of the case.

Be aware of the potential need to preserve and produce emerging forms of technology (e.g., instant messages, social media and data hosted in the "cloud"). See Orrick's June 2010 Alert on Cloud Computing.
Consider keeping a trusted vendor or client IT expert available or on-call to consult during the 'meet and confer'.
Be aware of local court protocols and rules regarding stipulations. For example:
Maryland Rule of Civil Procedure 2-402(e)(4) states that "clawback" or "quick peak" agreements are binding on the parties to the agreement but not on other persons; on the other hand, if the agreement is adopted by court order, that order governs all persons or entities, whether or not they are or were parties; and
The Nassau County Commercial Division in New York requires parties to report on ESI issues in their Preliminary Conference Stipulation and Order.xxviii (Section 12 (b)(ii) of the order gives parties the option to agree to ignore ESI altogether.)

To view all formatting for this article (eg, tables, footnotes), please access the original here.

Tags USA, Litigation, Orrick Herrington & Sutcliffe LLP

Rebecca G. Bradley
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Reining in E-Discovery Costs

Companies in litigation often face a burdensome and expensive electronic discovery process that c conducting business. Fortunately, courts are attempting to understand and address the issues fac procedural discovery rules to reflect the technical realities of e-discovery. Additionally, there are t to control the burden and expense of e-discovery long before litigation commences.

7th Circuit Electronic Discovery Pilot Program

In May 2009, the Seventh Circuit initiated the **Electronic Discovery Pilot Program** (Program), implementing, evaluating and improving pretrial litigation procedures to provide fairness and justi seeking to reduce the cost and burden of electronic discovery. A committee of attorneys, non-attc experienced with electronically stored information (ESI) drafted a set of principles (Principles) tha of the Program, which concluded in May 2010. In drafting these Principles, the committee identifi increase the cost of e-discovery, including the issuance of generic and lengthy preservation letter and expensive preservation of data well beyond a proper scope of discovery; lawyers' procrastina resulting from a limited understanding of best practices; and lawyers' lack of technical expertise.

The Principles were tested in 93 pending cases before 13 judges in the Northern District of Illinois Program, running until May 2011, the geographic reach of the Program has been expanded and th cases and judges increased. Although the Principles are not binding beyond the cases under whicl tested, they may constitute persuasive authority in cases venued within and outside of the Seven extent they reflect rules already embodied within the Federal Rules of Civil Procedure or adopted

Preservation Letters

The Program provides specific guidelines for the issuance of preservation letters and orders, cauti broad preservation orders should not be sought or entered and that information sought to be pres in scope and mindful of the proportionality principle set forth in Rule 26(b)(2)(C). Under that Rule frequency or extent of otherwise permissible discovery, if the court determines that the burden or discovery outweighs its likely benefit, considering the needs of the case, the amount in controver importance of the issues and the importance of the discovery sought in resolving those issues.

Additionally, the Principles encourage lawyers to draft preservation letters that contain useful info case has not yet been filed, such as party names, the factual background of the legal claim, poter of potential witnesses, and relevant time periods. Finally, the Principles encourage lawyers respor requests to identify what preservation efforts the responding party has undertaken, specify disagr preservation request, and raise preservation issues not already addressed.

Proportionality

Significantly, the Principles impose responsibility on parties and lawyers to take reasonable and p preserve relevant and discoverable ESI, "as appropriate for the case." The Principles specify certa generally not discoverable, such as deleted, slack, fragmented or unallocated data, RAM or ephen cookies, data in metadata fields that are frequently updated automatically, duplicative back-up da

extraordinary measures to preserve. These categories of ESI are not discoverable unless the parti the court otherwise orders, because they can dramatically increase the expense of discovery. Alth Principles, Rule 26(b)(2)(B) relieves a party of the burden of providing discovery of ESI from sour not reasonably accessible because of undue burden or cost. In this respect, the Principles and the Procedure largely reflect the developing body of case law that restricts the discovery of ESI that is only at great expense or by taking extraordinary measures.

Access to Business Records

Parties faced with permissible, but nonetheless burdensome discovery requests may consider the requesting party access to business records in lieu of responding, as allowed under Rule 33(d). In the responding party to specify the records from which the answer(s) may be obtained. This optio where the burden would be the same for either party. Responding parties may initially prefer this that it may not be feasible or desirable.

A responding party who invokes this option may be required to provide direct access to its electro well as technical support. One court held that Rule 33(d) may require the responding party to des extract data from computerized business records. Confidentiality considerations may persuade a p answers from its own records in order to protect confidential or trade secret information, or to cor security requirements imposed to protect third-party information held by the responding party.

Cost-Shifting

Parties compelled to respond to burdensome or expensive discovery requests may attempt to shif party. Cost-shifting is contemplated by Rule 26(b)(2) and has been considered or ordered by mul court first articulated a seven-factor test for cost shifting that was later adopted in the comments the Federal Rules of Civil Procedure. Those seven factors include the:

1. extent to which the discovery request is specifically tailored to discover relevant informatic
2. availability of information from other sources;
3. cost of production compared to the amount in controversy;
4. cost of production compared to each party's resources;
5. relative ability and incentive of each party to control costs;
6. importance of the issues at stake; and
7. relative benefits to the parties of obtaining the information.

Cost-shifting is sometimes considered and adopted by courts in conjunction with phased discovery order parties to proceed with a defined subset of discovery and then return to the court for furthe the court will conduct a benefit-burden analysis before determining to what extent, if at all, the pa of the discovery, or whether the cost should be completely shifted to the other party.

Litigation Pre-Nups

Companies are increasingly including dispute resolution clauses in commercial contracts that plac discovery in the event a dispute arises. Some parties incorporate by reference the **CPR Model Ec Agreement**. Others draft less-elaborate provisions that require the parties' senior executives to " suit is filed or arbitration is initiated. Other dispute resolution clauses limit the number of discover based upon the amount in controversy. Parties should be wary of well-intentioned dispute resoluti prohibit discovery because they violate the proportionality principle in reverse; usually at least so fully understand and value a party's claims or defenses—and its opponent's.

Conclusion

Cost-effective e-discovery requires an understanding of the ever-developing rules applied and pra litigants and lawyers. E-discovery may be effectively managed by taking a proactive approach in employing an e-records management program before litigation arises.

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HEADLINE: Electronically Stored Information in Litigation

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BODY:

Recent developments relating to the use of electronically stored information (ESI) in litigation have continued to fill out the picture sketched by the Zubulake line of opinions and the 2006 amendments to the Federal Rules of Civil Procedure, without changing the fundamental nature of parties' discovery obligations. Meanwhile, some courts, including the US Court of Appeals for the Seventh Circuit, are taking proactive steps to increase cooperation among counsel, head off discovery disputes before they arise, and reduce the costs of electronic discovery. The recent case that has garnered the most attention is Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities LLC. In Pension Committee, the court found that several plaintiffs' preservation efforts did not meet the standard necessary to justify a litigation hold. Other recent cases, both before and after Pension Committee, have also imposed adverse inferences based on failures to preserve ESI in a variety of contexts.

FULL TEXT:

I. INTRODUCTION

Recent developments relating to the use of electronically stored information ("ESI") in litigation have continued to fill out the picture sketched by the Zubulake line of opinions and the 2006 amendments to the Federal Rules of Civil Procedure,1 without changing the fundamental nature of parties' discovery obligations. Decisions within the last year illustrate that carelessness, as well as bad faith, can lead to sanctions for spoliation.2 Meanwhile, some courts, including the U.S. Court of Appeals for the Seventh Circuit, are taking proactive steps to increase cooperation among counsel, head off discovery disputes before they arise, and reduce the costs of electronic discovery.3

II. "ZUBULAKE REVISITED: SIX YEARS LATER": PENSION COMMITTEE OF THE UNIVERSITY OF MONTREAL PENSION PLAN V. BANC OF AMERICA SECURITIES, LLC

The recent case that has garnered the most attention is Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC* In the opinion, titled "Zubulake Revisited; Six Years Later," Judge Scheindlin makes it clear that a failure to follow the electronic discovery procedures laid out in Zubulake constitutes gross negligence and is sanctionable.5 Those procedures include issuing a litigation hold and considering the propriety of both cost-shifting of discovery costs and adverse inferences as sanctions for failing to preserve documents once the duty to do so attached.

In Pension Committee, the defendants filed motions seeking dismissal of the complaint or any lesser sanctions based on alleged gaps in the plaintiffs' evidence productions.6 The defendants contended that "each plaintiff failed to preserve and produce documents - including those stored electronically - and submitted false and misleading declarations regarding their document collection and preservation efforts."7

Judge Scheindlin first considered how to define negligence, gross negligence, and willfulness in a discovery context.8 The court concluded that the terms "describe a continuum" of conduct.9 The court determined that negligence comprises a "failure to conform" to the standard of meaningful and fair participation in the discovery process, "even if it results from a pure heart and an empty head."10 Judge Scheindlin defined gross negligence as "something more than negligence" that "'differs from ordinary negligence only in degree, and not in kind.'"11 She found that willful misconduct occurs when "the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences."12 Applying those definitions to discovery of ESI, the court found any "failure to preserve evidence resulting in the loss or destruction of relevant information is surely negligent, and, depending on the circumstances, may be grossly negligent or willful."13 The court provided two examples of discovery misconduct.14 First, the intentional destruction of relevant records, either paper or electronic, can be willful misconduct if it occurs after the duty to preserve evidence arises for a litigant.15 Second, "the failure to issue a written litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information."16 The court concluded that it is gross negligence for a party that is on notice of a potential claim to fail to: (1) issue a written litigation hold; (2) identify all key players and ensure preservation of electronic and paper records; (3) preserve and discontinue the deletion of records of former employees that are in a party's possession, custody, or control; or (4) preserve back-up tapes that are the sole source of relevant information or relate to key players, if not otherwise obtainable from readily accessible sources.17

In Pension Committee, the court found that several plaintiffs' preservation efforts did not meet the standard necessary to justify a litigation hold.18 In 2003, counsel asked the plaintiffs to begin collecting documents as part of the complaint- drafting process.19 However, counsel did not explicitly direct the plaintiffs to preserve all relevant documents or create a mechanism for collecting the documents.20 In addition, counsel did not issue a written litigation hold until after a stay of discovery was lifted.21 Judge Scheindlin held the plaintiffs were obligated to issue a written litigation hold.22 The court concluded that "the paucity of records produced" by the plaintiffs and their admitted failure to preserve or search for some records meant that "the relevant records have been lost or destroyed."23 Although the court concluded that no plaintiff had acted willfully, it found several plaintiffs grossly negligent and others merely negligent.24 As a sanction, the court imposed an adverse inference instruction, which consists of a court's instruction to the jury that, based on a party's failure to preserve and produce relevant evidence, the jury may infer that the evidence that was not preserved would have been adverse to the party's case.25 Judge Scheindlin also awarded fees and costs of the motion.26

III. OTHER CASES GRANTING ADVERSE INFERENCES

Other recent cases, both before and after Pension Committee, have also imposed adverse inferences based on failures to preserve ESI in a variety of contexts.

In Vagenos v. LDG Financial Services, LLC, a pre-Pension Committee case, the plaintiff based his claim on an automated message that was left on his cell phone's voicemail.27 The plaintiff played the message for his counsel, who re-recorded it on his own recording device.28 The plaintiff then deleted the original message.29 The defendant brought a motion seeking to exclude counsel's re-recording.30 The court concluded that the plaintiff and his counsel breached their duty to preserve evidence, but that they did not do so in bad faith.31 Nonetheless, the court found counsel's neglect to be "particularly egregious because plaintiff's counsel appears to have been unaware of his client's obligation to preserve evidence, and thus took no steps toward preservation."32 The court noted "[t]he responsibility of counsel to so inform his client [of the duty to preserve] is 'heightened in this age of electronic discovery.'"33 Ultimately, the court decided against excluding the recording because it "would be the death knell of this case."34 Instead, the court issued an adverse inference instruction.35

Rimkus Consulting Group, Inc. v. Cammarata36 was one of the first cases to consider Pension Committee. Here, the plaintiff filed a motion for sanctions, alleging the defendants intentionally destroyed relevant e-mails by instituting a two-week electronic retention policy after the duty to preserve had attached.37 In deciding the motion, Judge Rosenthal distinguished the facts from those in Pension Committee because the claim in Rimkus involved intentional destruction rather than negligent misconduct.38 The court noted that Federal Rule of Civil Procedure 37(e) includes a safe harbor

that precludes sanctions if information is destroyed through the routine, good-faith operation of a party's computer system.39 However, the court found that the defendants' decision to implement a two-week retention policy after the duty attached failed to qualify as routine and good faith.40 Judge Rosenthal cited Pension Committee as recognizing the difficult burden in requiring a party to show that information lost through spoliation was both relevant and prejudicial.41 However, the court observed that, in many cases, at least a portion of the spoliated evidence can be obtained or pieced together from other sources, including circumstantial evidence and deposition testimony42 Judge Rosenthal found that to be true in Rimfeus.43 On balance, the Rimkus court imposed an instruction that the jury must follow "the Court's determination that certain plaintiffs destroyed documents after the duty to preserve arose," but the jury could decide for itself whether the defendants were willful in their discovery misconduct.44

IV CASES DENYING ADVERSE INFERENCES

In other recent cases, courts have denied requests for adverse inferences on the basis that the intent of the party that failed to preserve ESI did not justify imposing an adverse inference.

In Mintel International Group, Ltd. v. Neergheen,*5 the defendant's employment contract deemed all documents generated by him to be the plaintiff's property46 The defendant, Neergheen, sent eight Mintel files to his personal e-mail address after giving notice that he was leaving Mintel.47 Neergheen was not asked to return his company-issued laptop or USB devices when he left.48 Mintel alleged that the defendant had spoliated evidence on his laptop by defragmenting its hard drive.49 The court found that there was no dispute that metadata on the laptop was destroyed when the defendant defragmented the hard drive.50 However, the court also found that there was no indication that the destroyed evidence was relevant.51 In addition, the court noted that the computer programs "were automated programs that had virtually no effect on the hard drive."52 The court concluded that no inference was appropriate because the evidence did not establish that the defendant had acted in bad faith.53

In Richard Green (Fine Paintings) v. McClendon, the plaintiff sought an examination of the defendant's personal computer, on which a spreadsheet had been stored.54 At that point, the defendant informed the plaintiff that she had reinstalled the operating system on her computer four months after the suit was filed, and that the computer no longer contained an original version of the spreadsheet.55 However, during the reinstallation process, the defendant transferred the contents of her hard drive to four CDs, which she kept.56 After finding that the obligation to preserve existed at the time of the spoliation, the court analyzed the defendant's degree of culpability and the relevance of the information.57 The court concluded that, unless the defendant "brazenly ignored her attorney's instructions, counsel apparently neglected to explain to her what types of information would be relevant and failed to institute a litigation hold."58 The court found that it was "highly unlikely that counsel actually conducted a thorough search for relevant documents in Mrs. McClendon's possession in connection with their initial disclosure duties or in response to the plaintiff's first document request."59 The court concluded that the defendant was at least negligent and counsel was grossly negligent.60 Nonetheless, the court did not order an adverse inference because it was unclear that the plaintiff had actually been deprived of information since the defendant eventually produced CDs made prior to the reinstallation.61 Instead, the court granted additional discovery in order to determine whether relevant information was lost.62

V SEVENTH CIRCUIT ?-DISCOVERY PILOT PROGRAM

The Seventh Circuit Electronic Discovery Pilot Program (the "Pilot Program") is designed to reduce the cost and burden of electronic discovery in federal litigation. During Phase One, which took place between October 1, 200Q, and May 1, 2010, thirteen federal district and magistrate judges implemented a series of Principles Relating to the Discovery of ESI (the "Principles") through standing orders in ninety-three civil cases pending in the Northern District of Illinois.63 The Seventh Circuit Electronic Discovery Pilot Program Committee ("E-Discovery Committee") focused on three major areas; preservation, early case assessment, and education.64

The main goal of the Pilot Program is to "assist courts in the administration of Federal Rule of Civil Procedure 1, to secure the just, speedy, and inexpensive determination of every civil case, and to promote, whenever possible, the early resolution of disputes regarding the discovery of [ESI] without Court intervention."65 The Principles are designed "to incentivize early and informal information exchange between counsel on commonly encountered issues relating to evidence preservation and discovery, both paper and electronic, as required by [Rule] 26(f) (2)."66 Among other things, the Principles provide for good-faith discussion of potential methodologies and production formats for ESI,67 require the designation of a knowledgeable e-discovery liaison,68 and propound a proportionality standard for all ESI requests.69

Chief Judge Holderman presented the Committee's report on Phase One in May 2010 at the Seventh Circuit Bar Association's Annual Meeting and Judicial Conference in Chicago. The Pilot Program will now expand, taking account of the feedback received in Phase One.70 Phase Two will begin on July 1, 2010, and run until May 1, 2012.71 In Phase Two, a larger number of participating judges from multiple districts will implement a revised set of the Principles.72 The Committee plans to present its report on Phase Two in May 2012 and then further expand the Pilot Program in a Phase Three.73

GRAPHIC: References

LOAD-DATE: December 11, 2010

Colorado at the Crossroads: Civil Access Pilot Project

by Natalie Brown, Gilbert A. Dickinson, Ann B. Frick, and Gordon W. Netzorg

The Colorado civil justice system, like others across the nation, continues to be a crucial element in society; yet, some argue it is suffering from a crisis of cost and delay. It is important that members of the legal profession ensure our system remains accessible to and trusted by litigants. We must recognize the importance of access to trial by jury for civil litigants as a hallmark of the American system of justice.

What follows is an explanation of a proposal for Colorado, designed to reduce cost and delay in accessing the judicial system, increase access to the courts for Colorado citizens, and enable Colorado rule makers to make informed decisions about ongoing reform. The Notice of Public Hearing and request for comments regarding Colorado's proposed Civil Access Pilot Project Rules, as well as the final draft of the proposed Rules, are printed in the Court Business section of this issue of *The Colorado Lawyer* beginning on page 123.

A Nationwide Problem and its Implications

The objective of the Federal Rules of Civil Procedure is to achieve the "just, speedy, and inexpensive determination of every action and proceeding."[1] This same objective has been incorporated into many state rules of civil procedure, such as Colorado's Rules of Civil Procedure.[2] The reality today is that in federal and state courts across the nation, this objective is in danger of not being met, in large part due to prohibitive expense and unacceptable delay. This failure is resulting in reduced access to and loss of confidence in our civil justice system. It is important that innovative steps be taken to preserve the right to a jury trial and to enhance the accessibility of the courts for all.

Recent national surveys indicate that litigation costs are disproportionate to the value of small cases,[3] and that costs are driving cases to settle for reasons unrelated to the substantive merits of the claims and defenses.[4] Furthermore, these surveys suggest that attorneys and law firms are turning down cases because it is not cost-effective to take them, and the most commonly cited monetary floor for that decision is $100,000—suggesting the problem extends beyond the smaller cases.[5]

Another by-product of expense and delay is that trials are disappearing. In the last half-century, civil trials as a percentage of total dispositions in U.S. district courts have declined precipitously from 11.5 percent in 1962 to 1.8 percent in 2002,[6] despite the fact that the number of civil filings in district courts has increased fivefold since 1962.[7] In state courts, where the most cases are filed, there is a similar decline. In a survey of twenty-two states, the number of civil jury trials decreased by 32 percent from 1976 to 2002, during which time dispositions overall doubled in these courts.[8] Data from the Colorado Judicial Branch Annual Statistical Reports indicate that trials—bench and jury—are rare in Colorado. At no time since 2002 did the trial rate exceed 1.7 percent of civil terminations; in several years, the trial rate was as low as one percent.[9]

Jurisdictions Respond

Access to justice and jury trials is not just an issue that concerns the indigent; increasingly, it concerns everyone. Moreover, the disappearance of the jury trial is one more loss of transparency and public input into the legal system. The reality of this situation demands action. One approach is to amend the process of civil litigation and see whether the changes reduce costs and increase efficiencies. Accordingly, a number of pilot projects of limited duration designed to test new rules and procedures are being developed and implemented in federal and state courts across the country.

In the U.S. District Court for the Northern District of Illinois, the Seventh Circuit Electronic Discovery Pilot Program commenced on October 1, 2009, developing as an outgrowth of widespread discussion about the rising burden and cost of electronic discovery.[10] In Massachusetts, the Suffolk Superior Court Business Litigation Session implemented a pilot project, effective January 4, 2010, to address the increasing burden and cost of civil pretrial discovery, particularly electronic discovery.[11] In New Hampshire, effective October 1, 2010, the Proportional Discovery/Automatic Disclosure (PAD) Pilot Rules Project in Strafford and Carroll County Superior Courts is designed to refocus the state civil justice system on the principle that the purpose of a trial is to do justice to the parties involved, which means a system that is efficient, affordable, and accessible to all citizens.[12] Six counties in Oregon have implemented an expedited civil jury trial program, which is driven by a sharp decrease in the percentage of cases decided by a jury.[13] Five other states have similar projects on the drawing board.

About the Authors

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A Local Proposal

With similar concerns and goals in mind, a group of Colorado state court judges and practitioners (Colorado Pilot Project Committee or Committee) came together in late 2009 to explore whether there was a need in Colorado for a pilot project. The Committee agreed that a pilot project would be an appropriate mechanism for experimentation with, and evaluation of, potential changes to the state rules of civil procedure.

The Committee decided to focus on two case types: (1) medical negligence actions (those alleging a breach of the standard of care by a health-care provider and that are covered under the Colorado Health Care Availability Act); and (2) business actions (including business-to-business cases, as well as individuals versus business, and defined in more detail in an appendix to the rules). These case types provide an opportunity to experiment with solutions for two unique problems of excessive cost: extensive expert discovery in medical negligence actions and electronic document discovery in business actions.

The Committee designated two subcommittees for the purpose of drafting pilot rules for medical negligence and business actions. Membership in the subcommittees comprised practitioners from the specialty bars—representing plaintiff and defense perspectives—and a judicial representative. After crafting separate provisions for each case type, the subcommittees merged the provisions into a single set of pilot rules. For both case types, the proposed Civil Access Pilot Project Rules focus on early and meaningful exchange of information, active case management, and proportionate pretrial procedures. The Colorado Supreme Court is accepting written comments regarding the proposed Rules and will be holding a public hearing on the Rules on January 19, at 1:30 p.m. (*See* the Notice of Public Hearing on page 123 for complete information.)

From Proposal to Pilot Project

The Colorado Pilot Project Committee has engaged in an ongoing dialogue with the Colorado Supreme Court, the Chief Judge of the Colorado Court of Appeals, and chief judges and other judges handling civil cases in the metropolitan districts. The response has been overwhelmingly positive. Pending approval of the pilot project by the Colorado Supreme Court, judges in the First, Second, Seventeenth, Eighteenth, and Twentieth Judicial Districts stand ready to participate. All medical negligence and business actions filed in participating courtrooms in these districts would be subject to the Pilot Project Rules for two years after the effective date.

Judicial and attorney information programs are an important component of an implementation plan, to promote consistent application across jurisdictions within the spirit of the Rules. Furthermore, if approved, the pilot project will be thoroughly measured and evaluated to determine the effectiveness of its various provisions in terms of access, efficiency, fairness, and cost. In partnership with the National Center for State Courts (NCSC), the Institute for the Advancement of the American Legal System (IAALS) at the University of Denver has developed a measurement protocol designed

to determine the effects of procedural change.[14] This protocol currently is being used in New Hampshire, where the NCSC is measuring the results of the PAD Pilot Rules Project.

Preliminary discussions with the Colorado State Court Administrator's Office indicate that Colorado courts are technologically capable of recording and measuring a majority of the factors and events included in the protocol. Surveys of attorneys will collect objective measurements, such as the average number of sets of interrogatories and non-expert depositions, in addition to attorney assessments of the pilot's processes and fairness. IAALS will use the data collected during the two-year pilot phase to evaluate the effectiveness of the project and then will communicate the results of the evaluation to those who will be deciding whether to make future amendments to the Colorado Rules of Civil Procedure.

Colorado Courts at the Crossroads

Colorado is not a state where civility and collegiality among counsel is the exception to the rule or where the public has completely lost faith in the system. We are fortunate to have a professional and courteous Bar, to have qualified and engaged judges, and to have a public that still looks to Colorado courts for the fair resolution of its disputes; however, we are not immune to rising costs, over-processing of cases, increased delay in case processing, and decreased access to the courts. Colorado's judicial system can be a leader in improving the courts. Colorado judges and attorneys have an obligation to make our civil justice system the best it can be, and it is in this spirit that the pilot project was developed. We urge the Bench and Bar to join with the Committee in trying to develop a system that lives up to the goals it espouses: a just, speedy, and inexpensive process for the determination of all disputes.

Notes

1. F.R.C.P. 1 (2010).

2. *See* C.R.C.P. 1, Scope of Rules.

3. American Bar Association (ABA), "ABA Section of Litigation Member Survey on Civil Practice: Detailed Report" 2, 153 (Dec. 11, 2009), available at www.abanet.org/litigation/survey/docs/detail-aba-report.pdf; Hamburg and Koski, "Summary of Results of Federal Judicial Center Survey of NELA Members, Fall 2009" 13, 42 (March 26, 2010), available at www.nela.org/temp/ts_A74249C2-BDB9-505C-1B1A9C44FB4D30DAA74249D2-BDB9-505C-1065E115F8FA0A27/NELAReport032610.pdf.

4. Institute for the Advancement of the American Legal System (IAALS), "Interim Report & 2008 Litigation Survey of the Fellows of the American College of Trial Lawyers" 3, A-6 (Sept. 9, 2008), available at www.du.edu/legalinstitute/pubs/Interim%20Report%20Final%20for%20web1.pdf (IAALS Interim Report); ABA, *supra* note 3 at 157-72; Hamburg and Koski, *supra* note 3 at 43-44; IAALS, "Civil Litigation Survey of Chief Legal Officers and General Counsel Belonging to the Association of Corporate Counsel" 19 (2010), available at www.du.edu/legalinstitute/pubs/GeneralCounselSurvey.pdf.

5. ABA, *supra* note 3 at 173. *See* IAALS Interim Report, *supra* note 4 at A-6, B-1; Hamburg and Koski, *supra* note 3 at 45.

6. Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts," 1 *J. Empirical Legal Stud.* 459, 462-63 (2004), available at www.marcgalanter.net/Documents/papers/thevanishingtrial.pdf.

7. *Id.* at 486.

8. Ostrom *et al.*, "Examining Trial Trends in State Courts: 1976–2002," 1 *J. Empirical Legal Stud.* 755, 768-69 (2004).

9. *See* Colorado State Judicial Branch, "Annual Statistical Reports," available at www.courts.state.co.us/Administration/Unit.cfm/Unit/annrep.

10. *See* Seventh Circuit Electronic Discovery Pilot Program Committee, "Seventh Circuit Electronic Discovery Pilot Program: Report on Phase One" 18 (2010), available at www.du.edu/legalinstitute/pdf/Chicago.pdf.

11. Press Release, Massachusetts Court System, "Superior Court Implements Discovery Pilot Project" (Dec. 1, 2009), available at www.mass.gov/courts/press/pr120109.html.

12. Rules of the Superior Court of the State of New Hampshire, "Superior Court PAD Pilot Rules (Proportional Discovery/Automatic Disclosure Pilot Project for Carroll and Strafford County Superior Courts)" 2-11 (2010), available at www.courts.state.nh.us/rules/sror/sror-h3-pilot%20project.htm.

13. Michaelis, "Pilot Project for Expedited Jury Trials," Oregon Law Practice Management (Aug. 19, 2010), available at oregonlawpracticemanagement.wordpress.com/2010/08/19/pilot-project-for-expedited-jury-trials.

14. National Center for State Courts and IAALS, "21st Century Civil Justice System: A Roadmap for Reform—Measuring Innovation" (2010), available at www.du.edu/legalinstitute/pdf/MeasuringInnovationforWeb.pdf. ■

7th Circuit Pilot Program Moves to Stage 2

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I. Background and Phase One

The December 2006 amendments to the Federal Rules of Civil Procedure ("2006 Amendments") served to focus attention on discovery of electronically stored information ("ESI"). Well known horror story decisions, such as *Zubulake v. UBS*, highlighted the need for a new approach to ESI Discovery. The 2006 Amendments were the Federal/Judicial Conference effort to bring uniformity and reason to the process.

The Seventh Circuit Electronic Discovery Pilot Program ("Pilot Program"), is another effort to impose sanity on the E-Discovery process. This effort developed as a result of concerns by attorneys and business leaders calling for discovery reform, and the release of reports by the American College of Trial Lawyers, the Institute for the Advancement of the American Legal System at the University of Denver ("IAALS"), and The Sedona Conference. The Pilot Program Committee is chaired by Chief Judge James F. Holderman of the U.S. District Court for the Northern District of Illinois, and U.S. Magistrate Judge Nan Nolan. The committee includes over 90 attorneys, drawn from litigation and corporate law practices, government, corporate counsel offices, academics, and consultants from the ESI Discovery industry.

From May to September 2009, committee members met in several different sub-committees, and produced the Pilot Programs Principles Relating to the Discovery of Electronically Stored Information (the "Principles"). The Principles were implemented and evaluated in Phase One of the program through a sample of litigations from October 1 through May 1, 2010.

There had been several calls for cooperation in the E-Discovery process prior to the Pilot Program, most notably the Sedona Conference® Cooperation Proclamation. The Principles take that philosophy a step further, incentivizing cooperation and providing specific guidance. The Principles recognize that many preservation and discovery issues can and should be discussed by counsel, and either resolved or promptly brought to the Court's attention. Many of these issues can be identified prior to the initial Rule 16 conference and those that cannot, should be raised as soon as practical.

The Principles also provide guidance "to the judiciary and the bar concerning the procedural framework for electronic discovery and technical aspects of electronic information storage, preservation and discovery."[1] That guidance should be equally valuable to corporate litigants. Many skilled attorneys are intimidated by ESI and the procedures of ESI Discovery, and are not effective in communicating the need for immediate review of ESI issues, at or before the onset of litigation. Corporate managers are often dismayed by the scope of E-Discovery, and the related expense. The time and effort necessary to conduct early case assessment can be daunting to attorney and client, but Principle 2.01(c) leaves

[1] Statement of Purpose and Preparation of Principles, Seventh Circuit Electronic Pilot Program, October 1, 2009, p. 10.

no room for debate.[2] Although other organizations offer guidance, the Principles are unique in having been tested and evaluated during Phase One. The Proposed Standing Order adopted by the participating courts and the Principles on which it is based, have been reviewed in light of the Phase One experience and necessary modifications have been adopted.

II. The Principles

The Principles are important guidance on how E-Discovery should be conducted. They are possibly more important when adopted by the court in the form of the Standing Order. Consideration of the Principles reveals several unusual features.

The Principles inject a concept into E-Discovery, that was previously foreign to most litigation: zealous representation of a client is not compromised by conducting discovery in a cooperative manner.[3] E-Discovery can be very expensive, and unreasonable failure to cooperate causes additional expense. Principle 1.02 implements Federal Rule of Civil Procedure 1, requiring counsel "to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay."[4] Counsel are expected to cooperate to facilitate discovery and reasonably limit discovery requests. Failure to act reasonably increases expenses and "contributes to the risk of sanctions."[5] Discovery is not to be used as "a weapon in ways that undermine resolving cases timely, efficiently, and on their merits."[6] Incorporated into a Standing Order, Principle 1.02 is a warning to counsel: scorched earth litigation tactics risk sanctions.

The Principles take that concept a step further. Federal Rule of Civil Procedure 26(b)(2)(C) provides the guidelines for a "proportionality" standard.[7] Principle 1.03 extends the reach of Fed. R. Civ. P. 26(b)(2)(C): "requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable."[8] Discussed below, proportionality is key in avoiding unnecessary expense, allowing focus on the merits of litigation rather than "gotcha litigation" where the expense of only marginally relevant discovery pressures settlement decisions, or discovery failures lead to sanctions.

Proportionality extends further: Principle 2.03 specifically disfavors vague and overly broad preservation requests. Preserving ESI can be difficult and disruptive to normal business and IT functions. Demands to preserve ESI "through the use of a preservation letter request or order should be reasonable in scope and mindful of the factors set forth in Rule 26(b)(2)(C)."[9]

Principle 2.02 adds a new member to litigation teams, the E-Discovery liaison. When an E-Discovery dispute arises, the E-Discovery liaison's role is required for "meeting, conferring, and attending court hearings on the subject."[10] The liaison may be in-house or litigation counsel, an employee of the party (*i.e.*, IT personnel), or a third party consultant.[11] It is axiomatic that legal counsel and IT speak different languages and lack common ground for understanding. The liaison is the translator, able to speak to opposing liaisons, IT, counsel, and the court. "The only requirements are that the liaison be available and competent to discuss the technology issues that are the subject of the dispute. A lawyer who lacks such competence and lacks the inclination to acquire such competence must involve a liaison who possesses the necessary technical expertise."[12]

Principle 2.02 requires the liaison to:

a Be prepared to participate in E-Discovery dispute resolution

b Be knowledgeable about the party's E-Discovery efforts

c Be, or have reasonable access to those who are, familiar with the party's electronic systems and capabilities in order to explain those systems and answer relevant questions

d Be, or have reasonable access to those who are, knowledgeable about the technical aspects of E-Discovery, including electronic document storage, organization, and format issues, and relevant information retrieval technology, including search methodology.[13]

III. The Ongoing Effort: Phase Two

Phase One was designed to be a limited test, formally including only 93 cases before a limited number of judges in the Northern District. Phase One was followed by analysis of the results through surveys and, if indicated, revision of the Principles. The Phase

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2 Referring to counsel's obligations in meeting with opposing counsel and preparing for the Rule 16 conference with the court, Principle 2.01(c) provides: (c) Disputes regarding ESI will be resolved more efficiently if, before meeting with opposing counsel, the attorneys for each party review and understand how their client's data is stored and retrieved in order to determine what issues must be addressed during the meet and confer discussions.

3 Principle 1.02

4 Report on Phase One, Seventh Circuit Electronic Pilot Program, May 20, 2009 – May 1, 2010, p. 51.

5 Principle 1.02

6 Report on Phase One, Seventh Circuit Electronic Pilot Program, May 20, 2009 – May 1, 2010, p. 51.

7 Describing when limitations on the frequency or extent of discovery are appropriate, Fed. R. Civ. P. 26(b)(2)(C) provides: *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

8 Principle 1.03

9 Principle 2.03(a)

10 Principle 2.02

11 *Id.*

12 Report on Phase One, Seventh Circuit Electronic Pilot Program, May 20, 2009 – May 1, 2010, p. 56.

13 Principle 2.02

One report was over 400 pages.[14] The judicial survey responses were generally positive, and often identified the E-Discovery liaison as the most significant, followed by the proportionality requirements.[15] Attorney comments were somewhat broader, but also largely focused on liaison, proportionality, and early case addressing of anticipated issues and disputes. Principles 1.02 (cooperation), 1.03 (proportionality), and 2.02 (liaison) were all well received and no changes were recommended in either Principle for Phase Two.[16] Revised Principles were issued August 1, 2010.

Phase Two expands on Phase One, extending the number of courts and cases covered within the Program and subject to the Standing Rule.[17] For the first time, judges outside the Northern District of Illinois, as well as additional judges within the Northern District, will participate. The Committee is also adding new members, including persons outside the Seventh Circuit, as interest in the program expands.

IV. The Focus on Proportionality

Consistent with the Pilot Program's focus on proportionality, the Sedona Conference® recently issued a major publication on the topic.[18] The Sedona Conference Principles on Proportionality ("Sedona Principle(s)") are consistent with the Pilot Program and its emphasis on Fed. R. Civ. P. 26(b)(2)(C):

1. The burdens and costs of preservation of potentially relevant information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation.
2. Discovery should generally be obtained from the most convenient, least burdensome, and least expensive sources.
3. Undue burden, expense, or delay resulting from a party's action or inaction should be weighed against that party.
4. Extrinsic information and sampling may assist in the analysis of whether requested discovery is sufficiently important to warrant the potential burden or expense of its production.
5. Nonmonetary factors should be considered when evaluating the burdens and benefits of discovery.
6. Technologies to reduce cost and burden should be considered in the proportionality analysis.

Sedona Principle 6 is particularly important in its relationship to the Pilot Program's liaison position. The commentary to Sedona Principle 6 suggests that the initial Rule 16 discussions should include "technological approaches to preservation, selection, review, and disclosure that reduce overall costs, better target discovery, protect privacy and confidentiality, and reduce burdens."[19] The Commentary goes on to recognize the rapid pace of technological change, and the difficulty these changes present to many litigators. Counsel is urged to either keep personally current on technology, or engage experts as needed. "Parties familiar with the available technological tools and their costs will have an edge in asserting, or responding to, arguments as to cost and burden."[20] The Pilot Program's requirement of a liaison similarly recognizes the advantage, to the court as well as the litigants, in having readily available a person conversant with the technology, and the party's own IT system. Most litigators, and many in-house counsel, are ill-equipped to play the liaison role. Third party consultants are just one of several options, but the liaison should be involved early in the process, to allow their expertise to be available to counsel, and the court, at the initial Rule 16 planning stage.

As the Pilot Program progresses through Phase Two, the proportionality principles will likely be even more prominent in the ESI discussion. With more courts and judges involved, and more cases formally subject to the Standing Order, parties and their ESI consultants will find it increasingly more important to understand those principles, and apply them early in the litigation. Counsels who do not understand ESI and these principles must have a good consultant, and should consider designating the consultant as their E-Discovery liaison under Principle 2.02.

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[14] The 26 mb .pdf file may be downloaded at: http://www.7thcircuitbar.org/associations/1507/files/05-2010%20Phase%20One%20Report%20and%20Appendix%20with%20Bookmarks.pdf
[15] Report on Phase One, Seventh Circuit Electronic Pilot Program, May 20, 2009 – May 1, 2010, pp. 36-37.
[16] Report on Phase One, Seventh Circuit Electronic Pilot Program, May 20, 2009 – May 1, 2010, pp. 52-53, & 57.
[17] In Phase One, in addition to Judge Holderman and Magistrate Nolan, only five district judges and seven magistrates, all within the Northern District of Illinois, participated, covering 93 cases.
[18] The Sedona Conference® Commentary on Proportionality in Electronic Discovery, The Sedona Conference Journal, Vol.11, Fall 2010, p. 289.
[19] *Id*, p. 301.
[20] *Id*, p. 302.

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The Seventh Circuit Electronic Discovery Pilot Program

by Cinthia G. Motley

The Seventh Circuit Electronic Discovery Pilot Program ("Program") was developed in response to continuing comments by business leaders and practicing attorneys, regarding the need for reform of the civil justice pretrial discovery process in conjunction with the Sedona Conference's release of the Cooperation Proclamation, urging the bar and bench to abandon adversarial conduct in pre-trial electronic discovery. The Program was initiated in May 2009 as a multi-year, multi-phase process to develop, implement, evaluate, and improve pretrial litigation procedures that would provide fairness and justice to all parties while seeking to reduce the cost and burden of electronic discovery.

Phase One of the Program

As part of Phase One of the Program the Seventh Circuit Electronic Discovery Pilot Program Committee ("Committee") promulgated the Phase One Principles Relating to the Discovery of Electronically Stored Information ("Principles"). 7th Cir. Bar Ass'n, Electr. Disc. Program, *available at* http://www.7thcircuitbar.org/associations/1507/files/Principles8_10.pdf (last visited March 3, 2011). The goal of the Principles is to provide incentives for the early and informal information exchange on commonly encountered issues relating to evidence preservation and discovery, both paper and electronic, as required by Federal Rule of Civil Procedure 26(f)(2).

The Principles contain three sections. The first section is titled "General Principles" and sets forth the Program's purpose and promotes cooperation and proportionality. *Id.*The second section, "Early Case Assessment Principles", sets forth the issues that should be evaluated and discussed at the early stages of litigation. *Id.* The third section discusses "Education Provisions" highlighting the need for judges, counsel and parties to become familiar with the fundamentals of electronically stored information (ESI) and to continue to educate themselves on electronic discovery. *Id.*

The Principles recognize the broad effect e-discovery has had on litigation and attempt, through cooperation and proportionality, to narrowly tailor e-discovery to the relevant issues in the dispute and thereby reduce litigation costs. Overall, these Principles provide guidance on how to streamline the discovery process and how to resolve disputes regarding electronic discovery. They also contain novel ideas, such as the use of e-discovery liaisons, to assist parties in efficiently managing discovery, particularly discovery involving complex ESI.

The Principles have generated a tremendous amount of interest in the legal community nationally and are being cited in judicial opinions. *See Heraeus Kulzer, GmbH v. Biomet, Inc.*, No. 2:10-cv-89, 2011 U.S. App. LEXIS 1389, at *4-*6 (7th Cir. 2011) (noting that while parties are not


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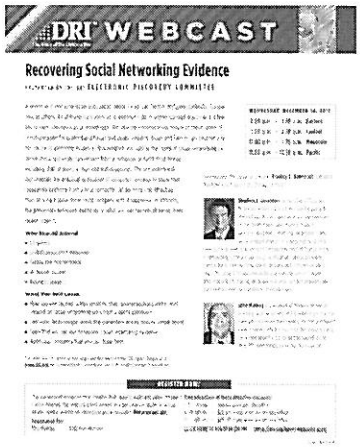

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required to meet and confer to negotiate the reduction of discovery, it is strongly recommended under the Principles, further noting a party's refusal to cooperate as an example of its stonewalling); *Tamburo v. Dworkin*, No. 04C3317, 2010 U.S. Dist. LEXIS 121510, at *8-*11 (N.D. Ill. Nov. 17, 2010) (ordering a phased discovery schedule to ensure that discovery is proportional to the specific circumstances of the case, and to secure the just, speedy, and inexpensive determination of the action).

Phase One Survey Results

Phase One of the Program ran from October 1, 2009 to May 1, 2010. During this period, 13 district and magistrate judges implemented the Principles through court orders entered in 93 civil cases, involving 285 attorneys. 7th Cir. Bar Ass'n, Electr. Disc. Program, *available at* http://www.7thcircuitbar.org/associations/1507/files/Principles8_10.pdf (last visited March 3, 2011). The participating judges and attorneys were sent a survey asking them to evaluate the Program. About 90 percent of the judges thought that the Principles "increased" or "greatly increased" the attorneys' familiarity with their clients' technology relating to electronic discovery. *Id.* Also, 67 percent of the judges indicated that the proportionality standard set forth in the Principles played a significant role in the development of discovery plans for their Phase One cases. *Id.* Notably, all the judges agreed or strongly agreed that the use of discovery liaisons increased the efficiency of the discovery process. About 43 percent of the attorneys said that the principles increased or greatly increased the fairness of the discovery process and about 61 percent said that the principles had no effect on their ability to resolve discovery disputes without court involvement.

Phase Two of the Program

Phase Two of the Program began August 1, 2010 and will run to May 1, 2012, with the promulgation of revised Principles. 7th Cir. Bar Ass'n, Electr. Disc. Program, Phase Two, *available at* (http://www.7thcircuitbar.org/associations/1507/files/Principles8_10.pdf), (last visited on March 3, 2011), preceded by the results of the base line survey. During Phase Two, the Committee hopes to expand the geographic reach of the Pilot Program and increase the number of cases and participating judges. The Committee is also lengthening the implementation period for Phase Two to allow for a more comprehensive testing of the Principles. *Id.*

The Program offers a useful model for other circuits (and states) to consider in implementing the Sedona Conference's Cooperation Proclamation. The Committee will formally present its continued findings at the judicial conference and annual meeting of the Seventh Circuit in May 2011.

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The Seventh Circuit Electronic Discovery Pilot Program

April 11, 2011 By Keith Schrodt Leave a Comment

Two weeks ago, I had the pleasure of chairing and speaking at IQPC's 2nd Annual eDiscovery Canada Summit in Toronto, Ontario. The Summit had some excellent content, as well as very informative open discussions on a wide variety of topics during the breakout sessions and networking lunches. One of the discussions I was involved in was about the Seventh Circuit's Electronic Discovery Pilot Program, a multi-year, multi-phase project that aims to improve the fairness and justice of pretrial litigation procedures, while reducing the overall cost and burden of dealing with ESI. With the second phase of the multi-year project about to wrap up (May 2011) and the committee's report soon to be released, I thought it might be worthwhile to summarize the program and recap some of its progress.

The Seventh Circuit has taken a very unique and forward thinking approach with regard to Electronic Discovery over the last several years. As a result of growing concerns from both business and legal communities about the rising cost of civil pretrial discovery, it has developed a three phase Pilot Program that is designed to help guide litigants through the Electronic Discovery process. In May of 2009, a committee of trial judges, lawyers, consultants and academics met for the first time to discuss and create founding principles for this pilot program.

During these meetings the committee agreed that the main goal was to better balance discovery costs against the efforts required to reach a "just, speedy, and inexpensive" determination of cases as intended by the FRCP. Red R. Civ. P 1. To this end, the committee formulated three supporting goals to be used as the basis of Phase One of the Pilot Program, which was implemented from October 2009 to May 2010. These were: (1) develop guiding principles for the discovery of ESI that are fair to all parties and minimize the cost and burden of discovery in proportion to the litigation; (2) implement those principles in actual pending or filed court cases; and (3) survey the judges and lawyers involved in the cases to determine the effectiveness of the principles, solicit opinions regarding improvements that could be made to the principles, and assess whether the principles fulfilled the Committee's goals.

For Goal (1), the committee created three areas of focus: (1) General Principles, (2) Early Case Assessment Principles, and (3) Education Principles. In my opinion, the real meat-and-potatoes of the three Principles exist in the Early Case Assessment portion. This section outlines the Meet and Confer requirements, the participation of an E-Discovery Liaison, Preservation Requests and Orders, Scope of Preservation, Identification of Electronically Stored Information, and Production Format. To me,

the most forward thinking principle is the designation of E-Discovery Liaisons by both parties to deal with disputes concerning preservation and/or production of E-Discovery. The liaisons are tasked with attending meetings and court hearings to discuss and deal with any disputes that arise and no matter who acts as the liaison (attorney, consultant, or employee of the party) the liaison must: (1) be prepared to participate, (2) be knowledgeable about the party's e-discovery effort, (3) be familiar with the party's electronic systems and/or capabilities to answer questions or explain appropriately and (4) understand the technical nature of the E-Discovery in regards to storage, organization, format, search capabilities, and retrieval options. If the liaison does not have personal knowledge in one of these areas they are required to have reasonable access to resources that do.

Having a designated liaison by each party to deal with Electronic Discovery related issues solves two basic problems that plague many lawyers – the tendency to put off the E-Discovery issue all together and the lack of technical expertise to have these discussions in the first place. As most of you know who have been down this road before, the challenge we face in dealing with ESI as a whole is first knowing where all the data resides, then understanding what form it is in and how you can remove it from a network or computing devices without destroying the data – all while balancing the costs. This is a challenge that few people can understand, let alone manage. A dedicated E-Discovery liaison with expertise or access to a resource with expertise, allows both parties to discuss these matters on a more practical and technical level, which helps move the process along and hopefully results in agreements beneficial to both parties. We all can agree, or I hope we can, that any mistakes made at this important stage of the discovery process can cost one or both parties enormous amounts of time and money if decisions are made before a full understanding and analysis of ESI is completed.

In regard to Goal (3), "survey the judges and lawyers involved", the Committee did just this and then released its findings in the Program Report on Phase One. From October 2009 through March 2010 the principles set forth were voluntarily implemented through a Standing Order in ninety-three civil cases by thirteen judges of the U.S. District Court for the Northern District of Illinois, including five district judges and eight magistrate judges. In March of 2010, the committee surveyed the 285 participating attorneys along with the judges. The survey results stated that 43% of attorneys thought the Seventh Circuits Standing Order increased the fairness of the discovery process and 38% of attorneys thought the Standing Order increased the parties' ability to resolve e-discovery issues without Court involvement. All thirteen judges unanimously agreed that the involvement of the E-Discovery liaison contributed to a more efficient discovery process, and 90% of the judges thought the Standing Order increased counsel's attention to ESI technology and familiarity with their client's data and data systems. Also, 90% of the judges thought the Principles increased or greatly increased counsels' level of attention to ESI issues and 92% of judges thought the Principles helped lawyers resolve discovery disputes before going to court.

Personally, I find it very exciting that all thirteen judges responded to the survey and unanimously found the use of an E-Discovery Liaison beneficial. Assigning this type of resource seems to have definitely paid off in their eyes.

Phase Two of the Pilot Program started in July 2010 and ends this May. The committee's main goal for this phase is to increase the number of cases and judges participating in the Pilot Program by expanding its geographic reach. The committee also considered creating protocols regarding the production of ESI, including production format, de-duplication procedures, production of redacted documents, TIFF processing specification, "Bates" numbering procedures, and "clawback" procedures. In addition, the committee was considering whether or not to modify standard FRCP Form 52 to better address ESI discovery issues. We will have to wait and see how these were handled over the past year in the upcoming report.

I hope everyone takes some time to research the Pilot Program and follow its progress through Phase Two and Phase Three. It really is a forward thinking initiative and I think once you read and analyze all the Principles set out, it will help you understand the increasing difficulties we face when dealing with ESI. You can read all about the Pilot Program on the Seventh Circuit's Bar Association Website at www.7thcircuitbar.org on the newly created E-Discovery home Page.

Keith Schrodt

Keith Schrodt, J.D. is a Senior Legal Consultant with AccessData Group. As a senior member of AccessData's Business Development Team, Keith is called upon to conduct seminars and customer presentations across North America to help teach legal professionals about AccessData's award-winning suite of litigation support and eDiscovery solutions. Keith is also a featured guest lecturer for conferences, bar associations, law firms, corporations, special interest groups and other organizations in regards to electronic discovery and evidence best practices. Prior to joining AccessData through a strategic acquisition, Keith held a Senior Business Development position with CT Summation for more than 5 years. Prior to joining Summation, Keith held VP positions at two Investment Banking Firms where he specialized in M&A and Commercial Real Estate transactions for a multi-billion dollar portfolio. Before receiving his JD degree in 2004, Keith enjoyed 10 years of successful sales experience within the high technology sector with companies such as Nortel, Fujitsu, Alcatel and several private start-ups. During his tenure, Keith earned industry recognition for his outstanding sales performance with product sales totaling in the hundreds of millions. Keith, who is a certified Mediator in Texas, donates his time in business and family law matters. Keith received his B.S. in Business Administration from the University of Texas, and his J.D. from Texas Wesleyan University School of law.

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Pilot program attracts great deal of interest

By Patricia Manson
Law Bulletin staff writer

A program launched in Chicago two years ago to reduce the hassles of electronic discovery "appears to be going viral," according to the top federal trial judge in the Northern District of Illinois.

Chief U.S. District Judge James F. Holderman said the 7th Circuit Electronic Discovery Pilot Program has attracted so much interest across the United States and in other countries that those behind the program have set up a website that is available to lawyers, judges, litigants and members of the public.

Information posted on discoverypilot.com includes the program's Principles for the Discovery of Electronically Stored Information as well as news and case law on e-discovery, Holderman said.

Holderman will report on the progress of the program on Tuesday, the final day of the annual gathering of judges and lawyers who work in the federal courts in Illinois, Indiana and Wisconsin.

The 2011 joint meeting of the 7th Circuit Bar Association and the 7th Circuit Judicial Conference, which is in Milwaukee, began Sunday.

The 7th Circuit Electronic Discovery Pilot Program Committee was established in 2009 in light of concerns about the difficulties and mounting costs of electronic discovery in civil cases.

The committee drafted principles addressing such matters as the purpose of electronic discovery, the need for cooperation among attorneys during discovery and the benefits of approaching the preservation and discovery of electronically stored information with a sense of proportion.

The principles also recommended using liaisons to help resolve disputes over discovery.

Eight magistrate judges and five district judges serving in the Northern District of Illinois participated in Phase 1 of the pilot program in a total of 93 cases.

Phase 1 of the program ran from October 2009 through March 2010.

Phase 2 began in May 2010 and is to run to May 2012.

The interim report on Phase 2 that Holderman will deliver Tuesday says more than three dozen judges are now taking part in the program in what is expected to be hundreds of cases.

The interim report also says the membership of the pilot program committee grew from about 50 people at the end of Phase 1 to more than 80 now.

Committee members include experts — in-house counsel, private practitioners, government lawyers, academics and litigation consultants — from the seven judicial districts within the 7th Circuit as well as from around the country, the report says.

U.S. Magistrate Judge Nan R. Nolan is the committee's chairwoman.

In a written statement Friday, Nolan said information about the e-discovery program was moved from the 7th Circuit Bar Association's website to an independent website in light of "the phenomenal interest, support and enthusiasm" the program has attracted.

Holderman said committee members have taken part in about 40 educational seminars in 12 states, as well as in Canada and China, over the last 18 months.

Chicago attorney Mary M. Rowland of Hughes, Socol, Piers, Resnick & Dym Ltd. said about 5,000 people registered to watch three webinars offered as part of the pilot program.

More webinars are being planned, said Rowland, who with Assistant U.S. Attorney Kathryn A. Kelly chairs the pilot program's education subcommittee.

Chicago attorney Timothy J. Chorvat of Jenner & Block LLP predicted that "countless people" will turn to the program's website to learn what the pilot program committee is doing "to maximize fairness in the pretrial litigation discovery process while minimizing the cost and burden of e-discovery."

That cost and burden "has been a 21st century plague on litigation in the United States," Chorvat said in a written statement.

Chorvat and Chicago attorney Christopher Q. King of SNR Denton chair the program's website subcommittee.

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The newsletter of the ISBA's Standing Committee on Government Lawyers

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In-sites

Electronic Discovery

For some time now, the discovery landscape has moved away from paper and into the electronic world. Electronically Stored Information (ESI) is the subject of discovery in almost every case, from e-mails to databases and beyond.

While government lawyers may still use the hard copy method, more and more attorneys and would-be plaintiffs are requesting ESI in its many forms. Also, there are cases where the government attorney should be requesting ESI.

In response to this growing area of the law, Judge Holderman and Magistrate Judge Nolan, both in the Federal Court in the Northern District of Illinois, convened a committee of lawyers, specialists and clients to study the issues of electronic discovery. The Committee drafted "Principles" for lawyers to employ in the discovery process. For the first year of the program, the Principles were used by select judges in the Northern District of Illinois. Following surveys and edits to the Principles, the Principles were updated. The Committee sponsored both webinars and live seminars to educate the legal community on the topic of ESI and the Principles.

The Seventh Circuit Electronic Discovery Pilot Program just launched their Web site. Www.discoverypilot.com contains a wealth of information. First, the Committee's Principles are provided. Many judges in the Seventh Circuit are using the Principles, in whole or in part. The participating judges are also listed. Second, the webinars hosted by the Committee are available for viewing. They range from an introduction of the Principles to an introduction of the mechanics of ESI. The site's resources are outstanding, including news articles on the topic and an expansive listing of cases in the Seventh Circuit and seminal national cases by topic.

Other resources for those interested in e-discovery include:

- <www.thesedonaconference.org> (Working groups of lawyers, experts, academics, and judges)
- <www.edrm.net> (Electronic discovery reference model)
- <http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt.pdf/$file/eldscpkt.pdf> (Managing Discovery of Electronic Information: A Pocket Guide for Judges)

If you haven't gotten familiar with ESI, you should and these free resources are a good place to start. ■

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ABSTRACT

"I said, 'Here's what we should do,'" [James Holderman] recalls. "We should develop principles and guidelines for lawyers involved in litigation in how they should conduct themselves when dealing with electronically stored information so the burden of asking for everything and providing the minimum is avoided. That way we focus more on what is needed and eliminate some of the discovery that is particularly burdensome."

FULL TEXT

Judge James Holderman is leading an effort to improve the e-discovery process for lawyers and IT teams, Dan Kaplan reports.

Representing a fi eld that is notorious for being a laggard when it comes to advancing in the digital era, Chief Judge James Holderman knew he was undertaking an ambitious task when he began his formal quest two years ago to reform the practice of electronic discovery.

But there was one fundamental reason that propelled the 65-year-old to want to change the landscape: He believed the onerous and costly nature of e-discovery was limiting the service of justice. In some cases, in fact, plaintiffs were so inundated with pre-trial discovery demands by the claimants' lawyers that they had no choice but to settle before the case ever made it to trial.

"It was nebulous at best as to what a party had to preserve and, frankly, the law hasn't advanced," Holderman says. "It affects justice in the United States because of the cost and burden of electronically stored information."

As chief judge of the U.S. District Court for the Northern District of Illinois since 2006 - he joined the court in 1985 after being nominated by President Reagan - Holderman believed that if he didn't take the initiative, the problems would only continue and likely worsen.

"I knew it was a problem when general counsel were coming up to me and saying that it's a problem and they didn't even have a case in front of me," he says. "Frankly, there was no question in my mind that at some point in time all discovery was going to be e-discovery. We needed to do something non-traditional."

It was May 20, 2009, when Holderman and Magistrate Judge Nan Nolan met with a group of lawyers at the U.S District courthouse in Chicago - "the best and brightest of the people we knew that were knowledgeable about electronically stored information" - to launch the Seventh Circuit Electronic Discovery Pilot Program, a fi rst-of-its-kind effort in the United States and one that builds on a proclamation from The Sedona Conference to remove adversarial relations from the pre-trial discovery process.

The main issue that came out of the initial meeting was the burden of cost, Holderman says. As the calendar fl ipped to the 21 century, legal teams began asking for exponentially more information - much of it often unnecessary - because data proliferated from paper records stored in a fi ling cabinet to information spread across email and other corporate systems.

"I said, 'Here's what we should do,'" Holderman recalls. "We should develop principles and guidelines for lawyers involved in litigation in how they should conduct themselves when dealing with electronically stored information so the burden of asking for everything and providing the minimum is avoided. That way we focus more on what is needed and eliminate some of the discovery that is particularly burdensome."

Meanwhile, Holderman also sought to educate individual corporations on the need to categorize their data to make the preservation and early-case assessment stages more manageable and effi cient.

On Dec. 1, 2006, an amendment to the Federal Rules of Civil Procedure took effect that ordered businesses and their lawyers to, at the start of any lawsuit, meet and discuss the scope of electronically stored information in the case. The updated regulation also mandated that organizations, at the fi rst whiff of a possible legal action, preserve any relevant data.

Even so, nearly fi ve years later, organizations are falling short at properly reining in these costs, says Sean Regan, director of product marketing at Symantec, which recently acquired Clearwell Systems for its e-discovery platform.

He says most entities exclusively are opting for backup technology for e-discovery purposes.

"That is an incredibly ineffi cient method of e-discovery," Regan says. "That's blunt-force discovery. Backup tapes were designed for full recovery. When the mail server goes down, backup is perfect for that. But when we start saving backup tapes indefi nitely because of e-discovery, it's overkill."

Beginning the process

The Seventh Circuit pilot program was implemented as a "multiyear, multiphase process to develop, implement, evaluate and improve pretrial litigation procedures that would provide fairness and justice to all parties while seeking to reduce the cost and burden of electronic discovery."

The program - now in its second phase - has brought together dozens of lawyers, judges and non-legal types, including vendor experts, to develop a set of principles that offer guidance on streamlining the discovery process.

"Lawyers need to have an understanding that everyone is not trying to hide the ball," Holderman says. "I said the problem is you don't trust each other. What we need to do is develop a system where you can still not trust each other, but you can trust that the system is not going to be able to be manipulated."

Initial fi ndings from phase two of the program were released in May, and it contains 11 principles, or duties. Among the notable ones:

* Cooperation: "The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions."

* Discovery proportionality: "[R]equests for production of electronically stored information (ESI) and related responses should be reasonably targeted, clear, and as specifi c as practicable."

* Meet and confer: "Prior to the initial status conference with the court, counsel shall meet and discuss the application of the discovery process."

Some of the principles apply more closely to the IT teams at defendant or plaintiff organizations. For example, the guidelines require the appointment of an e-discovery liaison, charged with mediatingf disputes. These appointees, Holderman says, maintain an understanding of how preservation and recovery works. Often times, they are security professionals and may have to appear in front of the judge.

In addition, the rules state that all parties to a case must discuss methods to identify relevant electronic data and avoid duplicate efforts.

Participating judges from the Seventh Circuit states of Indiana, Illinois and Wisconsin have placed these principles into some 300 cases already, Holderman says. Violators face contempt of court charges. Initial polling has shown that in most cases, lawyers have said the guidance does not decrease their ability to "zealously represent their client."

Moving discovery in-house

Of course, long before Holderman's pilot project ever got off the ground, there have been enough horror stories for IT departments to take note of the risks that come with an inadequate information management and governance program.

E-discovery is a major component of such a program.

The landmark case of Zubulake v. UBS Warburg should give pause to businesses. In 2002, Laura Zubulake fi led a gender discrimination lawsuit against her employer. It wasn't long after that the defendant was unable to produce relevant emails, due to either negligently or willfully destroying the emails or failing to properly preserve them. Ultimately, the case led to a $29.2 million jury verdict for the plaintiff.

Incidents like this have forced many organizations to recognize the importance of proper e-discovery tools, many of which have signifi cantly matured over the past several years, as well as the need to bring these capabilities in-house. In fact, according to Gartner, the global e-discovery market is expected to hit $1.5 billion in 2013.

Yet, according to an August 2010 Symantec study, less than half of enterprises - 46 percent - have a formal information retention plan in place.

And often, says Symantec's Regan, companies are leaning too heavily on shipping out their archived information to discovery services providers. This presents a two-fold problem: high cost and the potential for compromise.

"High cost is never an excuse," says Patrick Zeller, vice president and deputy general counsel of Guidance Software, a Pasadena, Calif.-based fi rm that specializes in forensics and e-discovery. "You can go and tell a judge that this is going to cost me a million dollars, but if you keep that data in a format that is diffi cult to search, that is not an excuse. Judges are going to order you to produce it."

And instead of relying on third-party vendors, organizations should consider shifting their e-discovery efforts in-house with software specifi cally designed for proper categorization, discovery and recovery, Regan says.

"If you don't bring a process in-house with IT and legal folks working together, you're exposing yourself to a huge amount of risk," Zeller says. He cites the Washington state Supreme Court's $8 million judgment against Hyundai Motor Co. for the carmaker's failure to comply with discovery demands.

E-discovery best practices have ancillary benefi ts as well. Organizations can identify unnecessary records and get a handle on the type of data they have stored in their systems, say experts. These solutions can assist organizations in realizing they are housing unnecessary confi dential information - or help them defend against a patent dispute.

E-discovery also can be used to investigate potential breaches. Zeller referenced a Chicago law fi rm that traced how many times an inadvertently sent email, containing the pay rates of associate attorneys, was forwarded.

Last fall, under the Seventh Circuit pilot program, a subcommittee was formed to help judges and committee members get up to speed on the latest in technology.

"It will help client IT and client legal clear up some of the language barriers and come up with standard wording," says Jennifer Freeman, co-chairwoman of the subcommittee and a senior legal consultant at Kroll Ontrack, a Minneapolis- based legal technology and consulting provider.

The subcommittee also is seeking to defi ne and assess those technologies that could lend greater effi ciencies while lowering cost and risk.

Still, Holderman says that despite software created specifi cally for e-discovery, tools are not available to "get all the needles out of the haystack."

"The reason is, electronically stored information is not stored for purposes of retrieval in litigation." he says. "It's stored for purposes of running the business."

Zeller says the preponderance of unstructured data, such as metadata - often defi ned as data about data - that is necessary for litigation is only adding to the complexity.

Ultimately, Holderman says, the goal of the e-discovery pilot program is to improve cooperation among IT and legal teams and increase education and awareness about the need to wrangle in the costly, time-consuming and argumentative nature that often is associated with the preservation, search, identifi cation, assessment and collection of pertinent data related to legal actions.

"I've said it at every meeting," Holderman says. "I think we need to change the culture of pretrial litigation in the United States. We are going to make pretrial litigation more reasonable and fair now Ultimately, companies and readers will have more concrete guidelines so they know they can keep stuff and delete stuff without someday getting sanctioned by a court."

SIDEBAR

Chief Judge James Holderman of the U.S. District Court for the Northern District of Illinois

A jury awarded $29 million to Laura Zubulake, a former UBS director who sued the company for discrimination, but the lawsuit's legacy comes from the issues it raised around e-discovery.

BEST PRACTICES: Litigation response

A combination of amendments to the Federal Rules of Civil Procedure - which state that companies, at the fi rst sign of a possible lawsuit, must begin archiving records that could be related to the case - and a general rise in the amount of litigation means organizations must expect to produce electronically stored documentation. Here are four tips:

Create/maintain records management protocols that keep data necessary for legal and business purposes and dispose of the rest.

Employ technologies for document review to improve the quality and minimize associated costs.

Invest in implementation of archiving technology, in addition to education and discovery policy creation.

Protect sensitive, regulated data and have detection and response capabilities in case an incident occurs.

"High cost is never an excuse."

- Patrick Zeller, Guidance Software

GRAPHIC: Photographs

LOAD-DATE: August 22, 2011

7th Circuit eDiscovery Pilot Program Launches National Outreach Committee

Created: 24 Aug 2011

AlliWalt SYMANTEC EMPLOYEE

Every day that I talk to customers, I personally encounter the need to bridge the knowledge and political gaps to make policy and purchasing decisions within corporations regarding eDiscovery. The other side of the coin has been that judges and outside counsel, as well as industry experts are coming together to find solutions to deal with these eDiscovery challenges in the courtroom. The 7th Circuit Principles (http://www.discoverypilot.com/) do just that, and are driving proactive behavior in addressing ESI, much to the pleasure of Judges.

It worked in the 7th Circuit, and evangelists are jumping on board in other Circuits, including the 9th Circuit. Art Gollwitzer (http://www.fblawllp.com/) , previously lived in Chicago and is a member of the 7th Circuit eDiscovery Pilot Program Committee. He practices patent law and was key in the formation of the Principles (http://www.discoverypilot.com/) , notably the Preservation Principle 2.04. Having moved to Austin, Texas, Art now heads the National Outreach Committee for the 7th Circuit Program. The timing is right for this new program, as judges and practitioners around the country are looking for guidance on handling ESI. Particular pain points for parties are: different rules across jurisdictions, data sources, formats, and the scope of preservation. Satisfying the need for direction, the 7th Circuit's Principles provide a checklist of important considerations for the initial meet & confer conference, as well as even-handed rules regarding preserving and producing ESI that provide more granularity to the Federal Rules.

In a recent case, Joao Control & Monitoring Systems of California, LLC v. ACTI Corp., et al., Case No. SA CV10-1909-DOC, in the Central District of California, Art was pleasantly surprised to see language that he helped write in a draft ESI order handed out by the court to the parties for their consideration at the initial status conference. "I was very happy to see the exact language that our committee drafted after many hours of discussion in the summer of 2009 in the court's proposed order," Art explained. "We worked hard to reduce the cost and burden of electronic discovery and to prevent ESI discovery from turning into a game of 'gotcha'."

The goal of the National Outreach Committee is to spread the word about the 7th Circuit's ESI Program and the benefits. "We envision spreading the word through articles, speeches, and 'grass-roots' or word-of-mouth efforts." To that end, liaisons in each Circuit or even each district can talk to judges and encourage colleagues to propose that courts adopt the Committee's principles in Rule 26(f) orders on a case-by-case basis. We also can describe the program and its principles at local bar associations and Inns of Court. Finally, we can volunteer for local rules committees or comment on ESI proposals for local rules," explains Art.

With each jurisdiction having its own local rules and each legal community having its own flavor, the exercise of bringing all stakeholders into the process to contribute to the Principles is unprecedented. Whether each Circuit starts their own Pilot Programs or adopts the 7th Circuits' Principles to start and then modifies as necessary, remains to be seen. What we do know is results from the 7th Circuit have been positive and that they have supporters nationally. The hope is that courts and practitioners will start with our Principles in order to avoid a crazy-quilt of ESI rules across the country.

Brief History

The 7th Circuit Electronic Discovery Pilot Program Committee was formed in May 2009 to conduct a multi-year, multi-phase project to develop, implement, evaluate, and improve pretrial litigation procedures that would provide fairness and justice to all parties while seeking to reduce the cost and burden of electronic discovery consistent with Rule 1 of the Federal Rules of Civil Procedure.

The Committee is unique in that it is comprised of the most talented experts in the 7th Circuit from all sectors of the bar, including: government lawyers, plaintiffs' lawyers, defense lawyers, and in-house lawyers from companies with large information systems, as well as experts in relevant fields of technology.

The Committee developed and promulgated "Principles Relating to the Discovery of Electronically Stored Information" ("Principles"), and a Proposed Standing Order (https://www-secure.symantec.com/connect/node/add/StandingOrde8_10.doc) by which participating judges could implement the Principles in the Pilot Program's test cases. Practicing lawyers wrote the Principles under the guidance of federal judges in Chicago, and the end-result is a consensus from experts in the field of eDiscovery rather than an approach dictated by the courts.

The Committee originally had 50 members by the end of Phase One in May 2010, and now has 80 members. The Committee includes members from all 7 federal districts in the 7th Circuit and around the country and is Chaired by Chief Judge Holderman and Magistrate Judge Nolan of the Northern District of Illinois. The Program has grown from 12 participating judges and just under 100 cases studied for a 6 month period in Phase One, to more than 36 participating judges and 100s of cases in which the Principles will be tested during the Phase Two period (May 2010 – May 2012).

Phase I

From October 2009 through March 2010, 13 judges of the United States District Court for the Northern District of Illinois implemented the Phase One Principles in 93 civil cases pending on their individuals dockets. On February 16, 2010, the Phase One Survey questionnaires were sent by email to the 285 lead counsel listed for each party in the Pilot Program cases, as well as the 13 judges from the U.S. District Court for the Northern District of Illinois. Survey responses were collected until March 7, 2010 on and all 13 judges responded while only 133 attorneys out of the 285 responded, and the results were sent to the Federal Judicial Center and to the IAALS in Denver for processing and analysis.

Key Findings

The general consensus of the participating judges overwhelmingly felt that the Principles were having a positive effect on counsel's cooperation with opposing counsel and on counsel's knowledge of procedures to be followed when addressing electronic discovery issues. The judges felt that the involvement of e-discovery liaisons required by Principle 2.02 contributed to a more efficient and cost effective discovery process. Many of the participating lawyers reported little impact on their cases, presumably mostly because of the limited duration of Phase One. But those lawyers who did see an effect from the application of the Principles in their cases overwhelmingly reported that the effect was positive in terms of promoting fairness, fostering more amicable dispute resolution, and facilitating their advocacy on behalf of their clients.

While most attorneys are following the guidance of Principle 2.01 (a) and (c), Duty to Meet and Confer on Discovery and to Identify Disputes for Early Resolution, it is barely the majority. And curiously, a significant minority of attorneys acknowledged they had not familiarized themselves with their client's information systems or had early discussions with their opponents about ESI preservation issues even though they were applicable in the case. (http://www.discoverypilot.com/)

What does this suggest?

That the landscape is improving, but that we still have a long way to go. Why would even one of these attorneys with a case in the Pilot Program ignore these relevant ESI issues? One of the major problems with the vagueness of the Federal Rules was a lack of clear cut guidance, and now even though there is a Standing Order in the case providing guidance, and that Principle 2.01 (d) outlines sanctions could in fact be imposed for failure to comply, some lawyers still did not! I can only surmise it is an issue of education.

I often suggest in meetings with our customers regarding archiving or eDiscovery capabilities, that they should first have a handle on what systems they have in-house and to be able to quickly communicate that to outside counsel. As a further measure, they should have a "cheat sheet" that brings outside counsel up to speed on their data maps and how each business unit deals with data. This saves time and money and prevents inconsistencies with production as well as the need to reinvent the wheel for each and every new outside lawyer representing the company. As we see more eDiscovery capabilities coming inside the corporate walls, these technology challenges for outside counsel should be minimized, the amount of data should be able to be reduced by archiving and deduplication, and organization should be more achievable with automated document retention schedules.

Phase II

Phase Two was originally planned to last one year, from May 2010 to May 2011, however a 2 year duration was found to be preferable for a fuller evaluation of the Principles' application during Phase Two. The Committee intends to present its Final Report on Phase Two next year, in May 2012 at the 7th Circuit Bar Association Meeting, before moving on to Phase Three. There were only slight modifications to the Principles form Phase I to II, and they essentially tightened up requirements adding specificity to the factors that need to be considered in the "identification" of relevant and discoverable ESI. Stay tuned for more exciting news regarding the National Outreach Committee and the Phase II Report.

Call to Action

Every Circuit should be forming a Committee and bringing practitioners, judges and experts together to weigh in on these important ESI issues. There is a successful model available with hard data. The 7th Circuit's Principles and Standing Order (https://www-secure.symantec.com/connect/node/Local%20Settings/Temporary%20Internet%20Files/Content.Outlook/AppData/Local/Microsoft/Windows/AppData/Local/Microsoft/Windows/Temporary%20Internet%20Files/Content.Outlook/51GT595T/StandingOrde8_10.doc) are a good place to start.

If you would like more information about becoming a member or having an educational event please feel free to email Art Gollwitzer (mailto:mailtoagollwitzer@fblawllp.com) at or Allison Walton (mailto:allison_walton@symantec.com).

StandingOrde8_10.doc (http://www.symantec.com/connect/sites/default/files/StandingOrde8_10_0.doc)

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Court Programs Working Toward Normalcy in E-Discovery

Ariana J. Tadler and Henry J. Kelston

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For years, practitioners and judges alike have been struggling with the complexities, burdens, and costs associated with electronic discovery. The "e-discovery amendments" to the Federal Rules of Civil Procedure (Federal Rules) took effect in December 2006. Since then, 27 states have incorporated some form of the federal e-discovery rules into their civil court procedures. While some practitioners and courts are effectively using the rules -- in conjunction with the rapidly evolving body of case law applying them -- to control the cost and burden of e-discovery, many others are failing to realize the full potential of the new provisions. As a result, in some cases, even compliant parties and counsel continue to struggle with titanic volumes of information created by continuously evolving technologies. The resulting frustration has given rise in some quarters to calls for yet more amendments to the Federal Rules, particularly in the areas of preservation, production, and sanctions.

For example, the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System have recommended radical limitations on discovery. These suggestions include curbs to limit the scope, type, source, and timetable of the discovery process, limits on the number of interrogatories or deposition hours, and other major changes. The Discovery Subcommittee of the Civil Rules Advisory Committee is actively considering these issues but has "reached no conclusion on whether rule amendments would be a productive way" of dealing with current concerns.[FOOTNOTE 1]

These calls for fundamental rules changes are coming at a time when federal and state courts have instituted a broad range of programs and measures to reduce the cost and burden of electronic discovery through more effective use of the *current* rules. Some courts have issued recommended e-discovery protocols, while others have instituted mandatory procedures; some judicial approaches include court supervision from the outset, others only when the parties request the court's involvement. Notably, certain jurisdictions have also instituted special e-discovery pilot programs.

Two basic principles underlie all of these approaches. First, the key to controlling e-discovery costs and minimizing disputes is cooperation and transparency between the parties early in the discovery process. Second, the current rules, including the Federal Rules, provide a sound framework in which cooperation and transparency can and should be achieved. In fact, some courts are utilizing the current rules to move from a position of "encouraging" early information exchange to requiring it under threat of sanctions for failure to cooperate in discovery.[FOOTNOTE 2] Though some of these court initiatives have proven successful, others are too recently enacted to have yielded results, and others are still in the development or proposal phase. Until more of these programs are implemented and their results systematically evaluated, any significant rule change would be premature and quite possibly counterproductive. [FOOTNOTE 3]

PILOT PROGRAM PRINCIPLES

The most closely watched e-discovery program is the 7th Circuit Electronic Discovery Pilot Program (Pilot Program), which places great emphasis on early and cooperative exchange of information. Recognizing cooperation as a desired outcome for litigants and judges, the goal of the Pilot Program was "not just to call for cooperation but also to *incentivize* the cooperative exchange of information on evidence preservation and discovery."

The principles adopted by the Pilot Program (Principles) first articulate the overriding importance of cooperation and proportionality in all phases of discovery, and then establish specific procedures for the implementation of these goals. The Principles provide specific guidance in the form of examples or "default positions," the use of "preservation letters," proposed methodologies to identify and cull electronically stored information for review and production, and the required scope of preservation.

For example, Principle 2.04 sets a very specific "default position" with regard to metadata and other difficult-to-preserve data: In most cases, data requiring extraordinary preservation measures not used in the ordinary course of business (e.g., deleted data, ephemeral data, and data in metadata fields that are frequently updated automatically) are presumptively not discoverable and any party intending to seek such data is required to raise the issue as soon as practicable.

The Principles further require any dispute regarding the adequacy of preservation be discussed first by the parties and, if not resolved, raised "promptly" with the court. Potential consequences for noncompliance provide meaningful incentives; under the Pilot Program, if a party fails to abide by this preservation dispute framework, it risks waiver of all claims or defenses concerning production of that data. Finally, the Principles emphasize pedagogy, stating that judges, attorneys, and parties, in addition to knowing the relevant rules and the Principles of the Program, should consult educational publications offered by The Sedona Conference and other organizations in regarding e-discovery issues.

Importantly, the Principles contemplate sanctions against a party that fails to participate and cooperate in good faith in the meet and confer process. When disputes arise, each party is required to appoint an e-discovery liaison to attend meetings, conferences, and court hearings on the issue.

THE RESULTS SO FAR

In Phase One of the Pilot Program, the Principles were implemented over a six-month period. Surveyed after the completion of Phase One, participating judges overwhelmingly found the Principles promoted cooperation between adversaries and increased attorney knowledge of e-discovery issues and procedures.[FOOTNOTE 4] Over 80 percent of the judges said the Principles reduced the number of discovery disputes brought before the court. The judges unanimously found the involvement of e-discovery liaisons resulted in a more efficient discovery process.

Taking an iterative approach, feedback for Phase One provided the basis for Phase Two of the Pilot Program. [FOOTNOTE 5] Notably, certain suggestion items in the Principles were changed to requirements in Phase Two. Principle 2.01, governing the meet and confer process, initially listed issues "to be considered for discussion," and now provides the enumerated subjects are "[a]mong the issues to be discussed." Formerly, the Principles stated that disputes "will be resolved more efficiently" if counsel understands a client's data storage and retrieval systems prior to the meet and confer; they now require that "attorneys for each party shall review and understand" their client's systems prior to the initial meeting. The Principles also have been revised to require parties to confer on the method of production of certain types of ESI. These revisions, among others, are intended to further incentivize the parties to focus on difficult ESI issues early in discovery. The Final Report on Phase Two of the Pilot Program is due in May 2012.

E-DISCOVERY IN THE SOUTHERN DISTRICT

Another noteworthy and promising initiative has been launched by the Southern District of New York, where the Judicial Improvements Committee has unanimously approved and adopted a set of best practices for the management of complex civil cases, including special discovery guidelines and a proposed form for a joint electronic discovery submission by the parties.[FOOTNOTE 6] The joint submission would describe any agreements the parties may have reached in areas such as preservation measures, methodologies to be used for search and review of ESI, sources of production, limitations on production (such as the number or identity of custodians, dates or locations of data, or phased discovery), privilege logs, clawback agreements, and the allocation of production costs. The proposed joint submission, as ultimately modified and entered as an order by the court, would create a framework to govern discovery in the litigation. The proposed form explicitly recognizes that "the electronic discovery process is iterative" and modifications to the order may become necessary as discovery proceeds.

The Committee's recommendation also requires that each party submit a "proportionality assessment" to the court prior to the initial pretrial conference. Thus, the Committee's approach emphasizes proportionality, early information exchange between the parties, and prompt identification of potentially troublesome discovery disputes while allowing the parties and the court flexibility to adapt to the surprises that inevitably arise in complex cases. The Committee's

recommendations, currently pending approval by the Board of Judges of the Southern District, are proposed for use in an 18-month pilot project -- again limited to complex civil cases.

AT THE STATE LEVEL

State courts are also formulating rules and guidelines. North Carolina recently adopted e-discovery rules that largely track the 2006 amendments to the Federal Rules and the 7th Circuit Pilot Program, emphasizing proportionality in e-discovery and encouraging the early discussion and possible resolution of discovery issues without the need for court intervention. Whereas North Carolina rules formerly included no "meet and confer" requirement, the amended rules give each party the right to require a meeting to discuss the possibility of settlement and the preparation of a discovery plan, after which the parties must submit to the court either a proposed joint discovery plan or a report explaining why they cannot agree on a plan.

Mirroring the 7th Circuit Pilot Program's requirement that the parties discuss specific subjects in the meet and confer session, the North Carolina rules provide that the discovery plan must include, if appropriate to the case, provisions addressing discovery of ESI, including production formats, preservation, possible allocation of costs, possible use of focused or phased discovery, and methods of preserving claims of privilege or confidentiality.

Like the 7th Circuit Pilot Program, the North Carolina amendments also adopt a "default position" on the production of metadata: "reasonably accessible metadata," such as date sent, date received, author and recipient, are discoverable. "Other" metadata is not discoverable absent an agreement by the parties or a court order. The North Carolina rules are expected to take effect on Oct. 1, 2011.

In Massachusetts, an Advisory Committee recently proposed amendments to the Rules of Civil Procedure to create a process "by which the parties, and the court if necessary, deal with electronic discovery early in litigation." (Draft Reporters' Notes at 2). The new rules add e-discovery to the list of subjects to be considered at a pretrial conference, specifically "[t]he preservation and discovery" of ESI. In this regard, the Massachusetts proposal goes beyond the Federal Rules, which do not currently directly address preservation.[FOOTNOTE 7]

The proposed rules also empower a party to demand a discovery conference with opposing counsel by serving a written request within 90 days of service of the first responsive pleading in the case. Within 30 days after service of the request, the parties must confer on e-discovery, specifically including issues related to the preservation production formats, production schedules, clawback, or other provisions relating to privilege claims, and the possible allocation of e-discovery costs among the parties.

After the expiration of the 90-day period, any party may request an e-discovery conference. If an agreement to confer is not reached within 30 days, the requesting party can move for a discovery conference. Within 14 days after an e-discovery conference -- whether as of right, by agreement, or by court order -- the parties must file a discovery plan and a statement describing the issues on which they cannot agree. The proposed Massachusetts amendments also allow the court to limit e-discovery "in the interests of justice," taking into account factors similar to those in the proportionality language of Federal Rule 26(b)(2)(C), including "whether the likely burden or expense of the proposed discovery outweighs the likely benefit."

The New York state courts are also aggressively addressing the challenges of e-discovery. In 2008, New York's Uniform Trial Court Rules were amended to include certain e-discovery issues (e.g., the programs in which ESI is maintained, the implementation of a preservation plan, and the identification of the individuals responsible for data preservation) among the matters "to be considered at [a] preliminary conference." The goal of the amendment was "to get the parties to meet and confer on ESI-related issues before the preliminary conference."[FOOTNOTE 8] However, the amendment lacked certain provisions that, since 2008, have come to be regarded as important elements of effective e-discovery programs:

> (i) discussion of e-discovery issues at the preliminary conference was not mandatory, but was required only "[w]here the court deem[ed] appropriate;"
>
> (ii) the parties were not directed to meet and confer concerning e-discovery in advance of the preliminary conference; and
>
> (iii) there was no requirement that counsel appearing at the preliminary conference be sufficiently knowledgeable about their client's data systems to be able to constructively discuss e-discovery issues.

Consequently, a February 2010 report to the Chief Judge and Chief Administrative Judge on the state of e-discovery in New York[FOOTNOTE 9] concluded the goals of the new e-discovery rules were "not being met." According to the report, "with a few exceptions involving seasoned lawyers who routinely litigate ESI-heavy cases, counsel generally ignore or seek to avoid dealing with [pre-preliminary conference] obligations related to ESI."[FOOTNOTE 10] The report emphasized the need for continuing education of practitioners, judges, and other court personnel, and recommended increased use of specially trained, court-appointed referees to supervise e-discovery and resolve protracted disputes.

The report recommended two initiatives for immediate implementation to improve the handling of ESI issues at the preliminary conference. First, it suggested amendments to the court rules to require that counsel appearing at the preliminary conference either be sufficiently knowledgeable to discuss their clients' technology systems or bring a client representative or outside expert to participate in the conference. Both the Uniform Rules and the Commercial Division rules were amended in July 2010 to implement this requirement.[FOOTNOTE 11] The report recommended that counsel in all cases be required to submit, at the preliminary conference, a form detailing the pre-conference efforts to meet and confer to address potential e-discovery issues in the case. This form is currently being tested in a pilot program.

The report posited two longer-term proposals to be tested in pilot programs as well. The first requires each party to make "initial disclosures" concerning ESI before the preliminary conference, including, among other things, the identity of the party's key IT personnel, efforts undertaken to preserve potentially relevant ESI, substantive witnesses likely to possess relevant ESI, and potential claims that relevant ESI is not reasonably accessible. The second requires the parties to jointly sign and certify a report to the court detailing the parties' meet-and-confer efforts, including agreements reached and areas of continuing disagreement.

CONCLUSION

As demonstrated by the examples above, which are a mere few among many,[FOOTNOTE 12] courts around the country are recognizing that early attention to e-discovery issues, including a cooperative exchange of information between the parties, is key to reducing the costs and delays of e-discovery.[FOOTNOTE 13] The 7th Circuit Pilot Program demonstrates clearly that best practices can be achieved under the current Federal Rules by using well-drawn, illustrative protocols to incentivize cooperation and transparency. Other programs are just getting underway and deserve time to reach their full potential. Perhaps after further time has elapsed, allowing for greater education of litigants and judges, and we have the benefit of assessing the various solutions, further modifications to the rules might be in order. But at this juncture, any significant rule change appears to be premature.[FOOTNOTE 14]

::::FOOTNOTES::::

FN1 As recently as September, the Rules Committee convened a mini-conference of judges, practitioners, and technologists to discuss the issues of preservation of e-discovery and sanctions.

FN2 See, e.g., the 7th Circuit Pilot Program discussed below.

FN3 Minutes of the Civil Rules Advisory Committee, Nov. 15-16, 2010, l. 542 ("Adopting express rules may create more discovery disputes than they eliminate"); see also Milberg LLP and Hausfeld LLP, "E-Discovery Today: The Fault Lies Not in Our Rules ... ," 2011 Fed. Cts. L. Rev. 4 (February 2011).

FN4 7th Circuit Electronic Discovery Pilot Program, Report on Phase One (2010).

FN5 7th Circuit Electronic Discovery Pilot Program, Interim Report on Phase Two (2011).

FN6 This article touches only upon the Committee's recommendations regarding discovery. However, unlike the 7th Circuit Pilot Program, the Southern District of New York's proposed Program is intended to address all procedural aspects of complex litigation.

FN7 In the process leading to the 2006 amendments to the Federal Rules, the Civil Rules Advisory Committee considered, but did not include, a preservation rule, in part due to concerns that a rule covering pre-litigation conduct would violate the Rules Enabling Act.

FN8 "A Report to the Chief Judge and Chief Administrative Judge: Electronic Discovery in the New York State Courts," (February 2010) at 1, http://www.nycourts.gov/courts/comdiv/PDFs/E-DiscoveryReport.pdf.

FN9 Id.

FN10 Id. at 8. Although special rules applying to cases in the Commercial Division of the New York courts required discussion of e-discovery issues at the preliminary conference, and required counsel to "confer with regard to anticipated electronic discovery issues" prior to the conference, the Report concluded both the Commercial Division and Uniform Trial Court Rules needed "fine-tuning to fulfill their intended purposes."

FN11 Uniform Trial Court Rule 202.12(b); Uniform Commercial Division Rule 1(b).

FN12 Numerous other jurisdictions have gone to great lengths to facilitate efficiency and a reduction in burden and cost, through a variety of similar and even enhanced measures. They include but are not limited to the federal district courts in Maryland (http://www.mdd.uscourts.gov/news/news/esiprotocol.pdf) and Kansas

(http://www.ksd.uscourts.gov/guidelines/electronicdiscoveryguidelines.pdf). See also Thomas Y. Allman's update on state e-discovery rules at http://www.eddupdate.com/2011/08/tom-allman-update-.html.

FN13 A notable exception to the trend of the courts to emphasize cooperation and early communication between the parties in discovery is the proposal for rule changes issued by the Civil Procedure Rules Committee in Pennsylvania. The Pennsylvania amendments contain no provision requiring the parties to communicate about discovery issues or to attempt to resolve disputes outside of court; instead, they focus solely on limiting the scope of e-discovery.

FN14 See also Milberg and Hausfeld, "E-Discovery Today," supra note 3.

Ariana J. Tadler is a managing partner at Milberg and head of the firm's e-discovery practice. She also serves on advisory boards for several e-discovery "think tanks," including The Sedona Conference mentioned herein. Henry J. Kelston is senior counsel at Milberg and a member of the firm's e-discovery committee.

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E-Discovery

7th Circuit Pilot Program Could Have Wide-Ranging Impact

BY MATHIEU J. SHAPIRO AND AARON L. PESKIN
Special to the Legal

The abundance of electronic information now available makes it more important than ever that litigators understand how to prepare their clients for e-discovery without letting prohibitive costs influence their clients' litigation decisions. Judges and lawyers in the 7th U.S. Circuit Court of Appeals understand this predicament and have taken preventive action by drafting e-discovery principles and implementing them, on a test basis, in hundreds of pending cases in the 7th Circuit.

HISTORY OF THE PILOT PROGRAM

Chaired and encouraged by Chief Judge James F. Holderman and Magistrate Judge Nan R. Nolan of the Northern District of Illinois, the 7th Circuit E-Discovery Pilot Program Committee was formed in 2009. Its mission was to develop pretrial litigation principles governing electronic discovery to reduce its cost and burden.

Written largely by practicing attorneys who have handled actual cases with e-discovery issues, the 7th Circuit's e-discovery principles are intended both to be flexible and to create discovery obligations proportional to the value of the case. The principles seem largely consistent with the Sedona Conference approach and less inflexibly rigorous than obligations imposed by *Pension Committee v. Banc of America Securities*, the *Zubulake v. UBS Warburg* decisions and the like. Those decisions are mostly reactive and one of the main goals of the 7th Circuit's pilot program is to be proactive in identifying potential e-discovery problems and creating solutions, rather than allowing courts to impose rigid frameworks through case law.

SHAPIRO PESKIN

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Perhaps most importantly, the program's principles are in the process of a substantial test drive by the judges and lawyers in the 7th Circuit.

The first phase of the pilot program ran from October 2009 to March 2010. Thirteen Northern District of Illinois judges participated (five district judges and eight magistrate judges). The participating judges implemented the principles in 93 civil cases pending on their respective dockets.

Phase Two began in May 2010 and will run until May 2012. The pilot program has been greatly expanded for this current phase and more than three dozen judges from several districts in the 7th Circuit are now implementing the principles in hundreds of pending cases. Moreover, lawyers familiar with the 7th Circuit's principles are asking judges in cases pending across the country to make the principles part of their scheduling orders.

THE PRINCIPLES

"The committee focused on proportionality and flexibility in its creation of the principles," according to Arthur Gollwitzer, a partner at Floyd & Buss in Austin, Texas, and the National Outreach Subcommittee Chair for the 7th Circuit Pilot Program. The principles are largely consistent with the Sedona Conference's work, but perhaps more practical. And, in contrast with *Zubulake* and *Pension Committee*, which are fairly strict and uncompromising, the principles were intended by their drafters to fit the needs of each case — large or small, complex or simple.

The 7th Circuit's principles begin with three general principles, titled "Purpose," "Cooperation" and "Discovery Proportionality." The purpose, not surprisingly, is to "secure the just, speedy, and inexpensive determination of every civil case" and to promote the early resolution of disputes regarding e-discovery. While recognizing an attorney's duty to zealously represent his or her client, the cooperation principle cautions that the "failure of counsel ... to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions." The proportionality principle calls for the application of F.R.C.P. 26(b)(2)(C) when formulating a discovery plan, and demands that discovery requests be "reasonably targeted, clear, and as specific as practicable."

To further the general principles, the committee set forth several specific principles dealing with all aspects of discovery:

• **Duty to Meet and Confer.** Under the pilot program, litigants are required to meet and confer prior to the initial status conference to discuss the application of the discovery process and how the principles are to be used. Issues to be discussed include identification of relevant ESI, scope of discoverable ESI, formats for preservation and production and the potential for conducting discovery in phases. Disputes regarding ESI which the parties cannot resolve are to be presented to the court at the initial status conference "or as soon as possible thereafter." Although the latter does leave some leeway, the committee has cautioned that the court may decline to resolve disputes that are not brought promptly to its attention. Additionally, counsel is required to review and understand how its client's data is stored and retrieved. "The idea is to address early on what you have to preserve and produce by providing notice early to your adversary and to get any issues in front of the court as soon as possible," said Gollwitzer.

• **E-Discovery Liaison.** During the initial meet-and-confer process, the parties are required to designate an individual as an e-discovery liaison. This person does not have to be an attorney, but he or she must be prepared to participate in e-discovery dispute resolution, have knowledge of the party's e-discovery efforts and have reasonable access to those individuals who have knowledge of that party's systems and the technical aspects of e-discovery.

• **Preservation Requests and Orders.** Preservation requests and orders are to be as narrowly tailored as possible and should include specific information, such as names of the parties, factual background of potential claims, names of potential witnesses and time period(s). Additionally, if a party chooses to respond to a preservation request, it should identify which information it is willing to preserve, any disagreements with the request and any additional preservation issues not already raised.

• **Scope of Preservation.** As discussed in the meet-and-confer principle, the parties should be prepared to discuss claims and defenses in each case, reasonably foreseeable preservation issues and discovery to be sought. Additionally, this principle lists several categories of ESI that are generally not discoverable, including RAM, temporary Internet files, frequently updated metadata fields and backup data that is more accessible elsewhere. This principle also includes a catch-all for "other forms of ESI whose preservation requires extraordinary affirmative measures that are not utilized in the ordinary course of business." If a party wants a particular type of information for its case, it must raise the issue at the outset; otherwise, it cannot later claim spoliation. By the same token, if a party objects to preserving or producing certain types of ESI, it must raise its objection at the outset, rather than attempting after-the-fact to justify destruction of ESI.

• **Identification of ESI.** At the meet-and-confer, the parties should discuss keyword searching, eliminating duplicative ESI, how to filter data by certain search parameters and other potential methodologies to reduce the scope of data to be reviewed and produced.

• **Production Format.** The parties should make a good faith effort to agree on the format of production, but, generally, ESI and other hard-copy documents that are not text-searchable do not need to be made text-searchable. The parties are encouraged to discuss cost-sharing of optical character recognition or other upgrades, but the requesting party is responsible for the creation of its copy of requested information.

RESULTS OF PHASE ONE AND GOING FORWARD

The overwhelming majority of participating judges found after Phase One that the implementation of the principles: (1) increased cooperation among the parties; (2) had a positive effect on counsel meaningfully attempting to resolve discovery disputes before requesting court involvement; and (3) increased counsel's attention to its clients' data systems.

Attorneys were somewhat less enthusiastic in their responses, but very few felt that the principles had a negative effect on the discovery process. Perhaps most importantly, 80 percent of attorneys stated that the principles had either a neutral or beneficial effect on total litigation costs. Attorneys, in particular, appreciated the discovery liaison requirement, noting that it allowed the parties to focus their discovery requests and create a more efficient discovery process, and, in fact, about 75 percent of attorneys felt that their opponent's liaison was also helpful. Additionally, both judges and attorneys found that they were required to become more familiar with the litigants' data management systems at a much earlier time, allowing the parties to resolve potential discovery disputes with greater finality at a much earlier point than had previously been experienced.

The report concluded that while the feedback of the attorneys and judges had been mostly positive, a common theme among the responses was that the brief period of Phase One did not allow the participants to render a complete opinion on the pilot program. Additionally, the report found that many parties were not adhering to the meet-and-confer guidelines of the principles. In response, the committee expanded the time of Phase Two to two years and made the meet-and-confer principles mandatory on all participating parties.

BEYOND THE 7TH CIRCUIT

Gollwitzer was appointed to chair the National Outreach Committee after helping to draft the preservation and production principles and with the goal of making the 7th Circuit Pilot Program's principles a well-known option for handling e-discovery in cases across the nation. The hope is that attorneys around the country will use the principles as a resource and become involved in the pilot program. To achieve this goal, participants are encouraging their colleagues to use the principles in both the 7th Circuit and other jurisdictions in which the principles are not yet required. Additionally, the principles, reports and other helpful information have been made available for use and can be found at www.discoverypilot.com.

Although Gollwitzer has extended invitations to join the pilot program to many of the attorneys who contacted him, he is not aware of much activity in the 3rd Circuit.

Anyone with exposure to e-discovery issues recognizes the potential for e-discovery costs to dwarf other litigation expenses and to make the proverbial "day in court" unattainable in all but the largest of cases. In the face of that challenge, the 7th Circuit Pilot Program has provided a truly valuable tool: Principles drafted, tested and revised by practitioners and judges actually using them in real litigation. The developments of this program are certainly worth watching. •

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ILLINOIS E-DISCOVERY: LOOKING FOR HIGHWAY SIGNS

Joseph R. Marconi[1]

In 1995, Illinois was one of the first states out of the starting gate to recognize the impending flood of electronic data discovery ("e-discovery"), by amending Illinois Supreme Court Rules 201 and 214 to acknowledge "electronically stored" materials. However, in the intervening decade and a half, virtually nothing further has been codified in this area and the Illinois appellate courts have little guidance on many difficult issues. This article summarizes the state of existing state rules and holdings..

Much of the development of e-discovery rules has occurred on the federal level, including the Northern District Court of Illinois that initiated an "Electronic Discovery Pilot Program" and recently concluded "Phase One." The Program established a set of guiding principles for managing e-discovery and presented a (proposed) Standing Order Relating To The Discovery of Electronically Stored Information. This initiative, Chaired by Chief Judge James Holderman, should facilitate more efficient e-discovery and forestall a lot of expensive and time consuming motion practice regarding this process.

However, at the state level, Illinois lags behind in developing either a statutory or common law body of rules specific to issues that arise in e-discovery. These issues include:

- Exchanging e-data in "native format";
- Using independent IT experts to assist with discovery plans and requests;
- Resolving inadvertent disclosures of confidential materials (both from a professional conduct and litigation rule aspect);
- Allocating costs of e-document productions and reviews between parties;
- Employing special masters to specially handle e-discovery disputes;
- Authenticating e-documents for use as evidence;
- Clarifying the duty to preserve e-documents both before and after the prospect of litigation or receipt of a "litigation hold" notice;
- Establishing "safe harbors" for companies which innocently destroy e-documents as part of a regular document management program;
- Determining the discoverability of "deleted" e-documents, "meta-data", and e-documents not readily retrievable or searchable (i.e. disaster recovery tapes).

Yet, a review of Illinois case law, court rules and statutes shows only the barest guidance for e-discovery. Even the recently activated (as of the first of this year) Illinois Rules of Evidence contains no treatment whatsoever of authenticity, hearsay, or other rules affecting the admissibility of electronic records.

That body of rules, as best as we can determine, is set forth below:

SCOPE

Ill. Sup. Ct., R 201 (b) Scope of Discovery.

(1) Full Disclosure Required. Except as provided in these rules, a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking disclosure or of any other party, including the existence, description, nature, custody, condition, and location of any documents or tangible things, and the identity and location of persons having knowledge of relevant facts. ***The word "documents," as used in these rules, includes, but is not limited to****, papers, photographs, films, recordings, memoranda, books, records, accounts, communications and* ***all retrievable information in computer storage.***

Rule 214. Discovery of Documents, Objects, and Tangible Things; Inspection of Real Estate

*Any party may by written request direct any other party to produce for inspection, copying, reproduction, photographing, testing or sampling specified documents...****A party served with the written request shall (1) produce the requested documents as they are kept in the usual course of business or organized and labeled to correspond with the categories in the request, and all retrievable information in computer storage in printed form****...*

The first paragraph of Rule 214 was amended in 1995 to require a producing party to provide all computer-stored responsive information in printed form. According to the Committee Comments, this change was intended to prevent parties from "producing information from computer storage on storage disks or in any other manner which tends to frustrate the party requesting discovery from being able to access the information produced." Committee Comments, S.Ct. Rule 214 (June 1, 1995).

COST/PROPORTIONALITY

As of yet, there is a dearth of appellate decisions in Illinois evaluating the proper scope and breadth of e-discovery requests in civil discovery. The most extensive discussion of cost shifting or sharing with requests for "computer tapes" has been in the highly limited and statute-based cost provisions of the Illinois Freedom of Information Act. *American Federation of State, County & Municipal Employees (AFSCME) v. County of Cook,* 136 Ill. 2d 334, 341; 555 N.E.2d 361, 363 (Ill. 1990).

In the only case involving allegedly oppressive e-discovery requests, the Illinois Appellate Court merely reaffirmed, with little guidance, that it is an abuse of discretion to sanction a party for failing to comply with an "oppressive" e-discovery request. *Leeson v. State Farm Mutual Automobile Insurance Co.,* 190 Ill.App.3d 359, 546 N.E.2d 782 (1st Dist. 1989 ("When an electronic discovery request is found oppressive in nature, courts have decided against sanctioning the producing party for noncompliance.").

INADVERTENT DISCLOSURES

ETHICS:

"Generally, inadvertent disclosure of confidential metadata [hidden electronic data contained within electronic documents] can be viewed ethically and legally in the same manner as any other inadvertently disclosed confidential information…" Joseph R. Marconi, *Electronic Discovery: Dealing with Disclosure of Metadata*, 97 Ill. Bar J 25, (2009). In Illinois, if inadvertently disclosed confidential information is received, the receiving attorney must notify opposing counsel, but no automatic duty to return; if disclosed, the sending attorney must notify client. Illinois Ethics Opinion 98-04 (1999).

WAIVER:

Illinois, though not completely settled, tends toward the "balancing test" that looks to five factors to determine if waiver has occurred: 1) the reasonableness of the precautions taken to protect the document; 2) the time taken to rectify the error; 3) the scope of discovery; 4) the extent of the disclosure; and 5) the overriding issue of fairness. *Urban Outfitters, Inc. v. DPIC Cos.*, 203 F.R.D. 376, 380 (N.D. Ill. 2001) [citing Illinois law].

Consequently, the key to protecting privileged information from inadvertent disclosure is establishing a systematized procedure that not only includes an ongoing familiarization with a client's electronic files and the software that manages it, but also in drafting appropriate protective orders which limit the scope of production and provide for a "claw back" of such information. "[T]he resulting anxiety and impact can be substantially limited through the routine employment of technically savvy electronic review and a protective order which anticipates and addresses the virtual inevitability of inadvertent disclosures." Joseph R. Marconi, *Electronic Discovery: Dealing with Disclosure of Metadata*, 97 Ill. Bar J 49, (2009).

SANCTIONS FOR SPOLIATION

Illinois S.Ct. Rule 219 provides additional relief for the complaining party. These include

1. barring witnesses; 2. monetary fines and interest; and 3. any other "appropriate sanctions" as determined by the court.

In *Liebert Corp. v. Mazur*, 357 Ill. App. 3d 265; 827 N.E.2d 909 (1st Dist. 2005), a party was subjected to an appropriate sanction in terms of requiring the fact finder to make negative inferences regarding the content of e-documents that were destroyed through "bad faith" spoliation. "We can

infer from Mazur's spoliation of the evidence on the laptop that he destroyed evidence of misappropriation…Where a party has deliberately destroyed evidence, a trial court will indulge all reasonable presumptions against the party." *Id.* at 286.

COST SHIFTING

There is no existing Illinois state case law or statutory basis for shifting the cost of discovery. However, Illinois Supreme Court Rule 201(c) states:

(c) Prevention of Abuse.

(1) Protective Orders. The court may at any time on its own initiative, or on motion of any party or witness, make a protective order as justice requires, denying, limiting, conditioning, or regulating discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression. (2) Supervision of Discovery. Upon the motion of any party or witness, on notice to all parties, or on its own initiative without notice, the court may supervise all or any part of any discovery procedure.

AUTHENTICATION

E-discovery also raises evidentiary issues such as the authentication of e-documents. Illinois, unlike other states, has not enacted civil procedure rules allowing the fact that a party produced a document in discovery to establish its authenticity (such as Tex. R. Civ. 193.7) or have otherwise adopted the position that production of a document can establish its authenticity. "In the absence of any argument citing such authority, we will not create the rule validating authentication by production in Illinois." *Complete Conf. Coordinators, Inc. v. Kumon North Am., Inc.,* 394 Ill. App. 3d 105, 109 (2d Dist. 2009). Thus, along with planning the scope of e-discovery, parties must contemporaneously establish a means of authentication, either by requests to admit, interrogatories or the testimony of people knowledgeable about how such records are created, stored and maintained.

Hearsay exclusions are also an issue when the material presented is information stored in, as opposed to being created by, the computer itself. Illinois courts have recognized a distinction between computer-generated and computer-stored records. Records directly generated by a computer generally are admissible as representing the tangible result of the computer's internal operations…In contrast, printouts of computer-stored records constitute statements placed into the computer by out-of-court declarants and cannot be tested by cross-examination and, therefore, are inadmissible absent an exception to the hearsay rule. *Anderson v. Alberto-Culver USA, Inc.*, 337 Ill. App. 3d 643, 667 (Ill. App. Ct. 1st Dist. 2003)

CONCLUSION

Court or legislative guidance on these issues would be immensely valuable to attorneys dealing with e-discovery—in other words, virtually every litigator in Illinois and in-house or corporate counsel of companies subject to our jurisdiction. Such rules would be major factors in conceiving litigation budgets and discovery plans, as well as document requests and responses. Likewise, such guidance will assist attorneys and courts handling motions to compel, privilege issues, and cost sharing. Ambiguity in the rules of the game means time, and lots of it; and in law, as we are all painfully aware, time is money.

[1] Joe acknowledges the assistance of Johnson & Bell, Ltd. paralegal Mike Castellaneta, J.D., for assistance in preparing this article.

Printable Article

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February/March 2012 / E-Discovery

The 7th Circuit Pilot Program and How it Could Affect E-Discovery Practice

Jennifer Liebman Coyne, Applied Discovery, and Vanita Banks, Allstate Insurance Company

In 2009, the Seventh Circuit's Electronic Discovery Pilot Program was created by a committee of judges, attorneys, academics and consultants, with a goal of improving e-discovery-related procedures and reducing their cost. Now in the second of three projected phases, the program is likely to change the practice nation-wide, according to the authors. Practitioners and executives are advised to understand its basics.

The committee recognized that generic demands for all ESI, issued at the outset of a case, were a basic part of the problem, setting the stage for an adversarial proceeding from then on. They formulated eleven principles intended to promote early informal exchange regarding how e-discovery was to be handled. The principles address such issues as preservation; cooperation and proportionality; early case assessment; and the important of judges, attorneys and parties becoming educated on e-discovery issues.

One principle details the categories of electronically stored information, like deleted, fragmented and temporary files, that generally should not be discoverable. Another addresses how data can be made as useful as possible to the opposing party, while making the requesting party responsible for the costs. After the principles were applied in 93 cases, a survey of judges and attorneys who participated found overwhelming approval by judges and mixed responses for attorneys.

The authors suggest that in anticipation of the program's likely effect, companies analyze their own IT systems; designate an e-discovery liaison in case of litigation; and carefully frame a retention policy.

This is the executive summary – to read the full article
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District Of Delaware Adopts Default Standards For **E-Discovery**

Ms Stephanie Blair, Scott A. Milner, Jacquelyn A. Caridad, Denise E. Backhouse, Tara S. Lawler, Lorraine M. Casto, Graham B. Rollins, Jennifer M. Williams, L. Keven Hayworth, James B. Vinson, Wayne R. Feagley and George E. Phillips

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The trend continues toward increased judicial involvement in **e-discovery** to lower litigation costs and promote cooperation among litigants.

Morgan Lewis (United States)District Of Delaware Adopts Default Standards For E-Discovery28 February 2012

In its continuing efforts to ease the financial burdens of litigants, the Ad Hoc Committee for Electronic Discovery of the U.S. District Court for the District of Delaware recently amended the court's Default Standard for Discovery (the Standard). This revision continues a recent trend on the part of the federal courts, which have attempted to lower the costs associated with **e-discovery** by offering guidelines designed to streamline the process. Some examples of this trend include the following:

In September 2011, the U.S. Court of Appeals for the Federal Circuit unveiled a Model Order for **E-Discovery** in Patent Cases designed to reduce discovery costs. 1
In November 2011, the U.S. District Court for the Southern District of New York implemented Standing Order M10-468, In re: **Pilot** Project Regarding Case Management Techniques for Complex Civil Cases in the Southern District of New York, which details the court's expectations regarding **e-discovery**. 2
In January 2012, Chief Judge Randall R. Rader of the Federal Circuit, together with three other members of the Federal Circuit Advisory Council, presented a proposal to the U.S. International Trade Commission (USITC) to streamline **e-discovery** in ITC section 337 investigations. 3
This month, the judges in the U.S. District Court for the Eastern District of Texas intend to discuss a committee report on the Federal Circuit Model Order on **E-Discovery** in Patent Cases to address what U.S. District Judge Leonard Davis—who will become chief judge of the Eastern District next year—calls "a very legitimate con-

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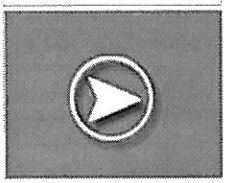

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